86 1491

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

William P. Pointon, Jr.,
Petitioner,

vs.

James Patterson, Clerk of the Supreme Court of the State of Oklahoma, Honorable Robert D. Simms, C.J., Honorable John B. Doolin, V.C.J., Honorable Ralph B. Hodges, J., Honorable Robert E. Lavender, J., Honorable Rudolph Hargrave, J., Honorable Alma Wilson, J., Honorable Yvonne Kauger, J., Honorable Hardy Summers, J., Honorable Marian P. Opala, J., Justices of the Supreme Court of the State of Oklahoma, and,

City of Choctaw, Oklahoma, and,

State of Oklahoma ex rel., Oklahoma State Department of Health,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA STATE SUPREME COURT

William P. Pointon, Jr.
Attorney pro se
P.O. Box 4130
Nicoma Park, Okl. 73066
(405) 769-3365

I. QUESTIONS PRESENTED

1. Should the Supreme Court of the State of Oklahoma, in it's exercise of discretion, summarily and arbitrarily deny Certiorari to an Order of The Court of Appeals of the State of Oklahoma, which affirmed a Judicial Review by the Oklahoma County District Court, sitting as an appellate Court of the Final Order of a State agency based on the statutory authority of the Oklahoma Administrative Procedures Act, (a statute of limited jurisdiction) which was:

   a. clearly without jurisdiction of both Plaintiff and Defendant; and,
   b. adjudicated issues outside it's province?

Petitioner seeks the issuance by this Court of a Writ of Certiorari authorized by 28 U.S.C. §1651 (a) to the members of the Supreme Court of the State of Oklahoma to review The Court of Appeals of the

State of Oklahoma's decision in this case and correct a gross injustice.

2. In the alternate, pursuant to 28 U. S.C. §1257 (2) and (3): Should the Supreme Court of the State of Oklahoma by its denial of Certiorari, affirm the above orders which violate petitioner's Federal Rights? to-wit:

a. Use of an unconstitutional rule: The 1980 Standards of the Oklahoma State Department of Health which is repugnant to the constitution of the United States;

b. The ex post facto clause and the Contract clause of the United States Constitution;

c. The Thirteenth Amendment of the United States Constitution;

d. The Fourteenth Amendment of the United States Constitution: due process and equal protection clauses.

II. PARTIES

Petitioner, William P. Pointon, Jr., is Defendant-Appellant in an action void of jurisdiction, denied review by Certiorari to the Supreme Court of the State of Oklahoma to correct this oppressive error.

Respondents:

James Patterson, Clerk of the Supreme Court of the State of Oklahoma, Honorable Robert D. Simms, C.J., Honorable John B. Doolin, V.C.J., Honorable Ralph B. Hodges, J., Honorable Robert E. Lavender, J., Honorable Rudolph Hargrave, J., Honorable Alma Wilson, J., Honorable Yvonne Kauger, J., Honorable Hardy Summers, J., Honorable Marian P. Opala, J., Justices of the Supreme Court of the State of Oklahoma, and,

City of Choctaw, Oklahoma, and,

State of Oklahoma ex rel., Oklahoma State Department of Health.

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IN THE

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OCTOBER TERM, 1987

William P. Pointon, Jr.,
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James W. Patterson, Clerk of the Supreme Court of the State of Oklahoma, Honorable Robert D. Simms, C.J., Honorable John B. Doolin, V.C.J., Honorable Ralph B. Hodges, J., Honorable Robert E. Lavender, J., Honorable Rudolph Hargrave, J., Honorable Alma Wilson, J., Honorable Yvonne Kauger, J., Honorable Hardy Summers, J., Honorable Marian P. Opala, J., Justices of the Supreme Court of the State of Oklahoma, and,

City of Choctaw, Oklahoma, and,

State of Oklahoma ex rel., Oklahoma State Department of Health.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA STATE SUPREME COURT

IV. OPINIONS BELOW

The opinions are set out in the Appendix as follows;

Order of the Oklahoma County District

Court on "Judicial Review" of an Order of a State agency, filed June 8, 1984 27a thru 30a;

Opinion of the Court of Appeals of the State of Oklahoma, Division No.1, Affirmed, filed September 30, 1986, 3a thru 26a;

Order of the Court of Appeals, Division 1, State of Oklahoma, rehearing denied filed October 14, 1986, 2a;

Order of the Supreme Court of the State of Oklahoma, Certiorari denied, filed December 16, 1986, 1a.

V. STATEMENT OF JURISDICTION

A Notice of Appeal to this Court was filed within 90 days from judgment of the Oklahoma Supreme Court.

The highest court of the State in which a decision could be had, denial of Certiorari, which qualifies this case to be reviewed by the Supreme Court of the United States. Several Federal Questions are involved. Oklahoma courts lacked a proper

jurisdictional base and allowed adversaries the use of their courts as a stage for their vendetta of harassment and abuse.

Petitioner petitions this Court to review the following Orders:

1. Order of the Supreme Court of the State of Oklahoma, dated December 16, 1986, Certiorari Denied.

2. Order of the Court of Appeals of the State of Oklahoma, dated October 14, 1986, Rehearing Denied.

3. Opinion of the Court of Appeals of the State of Oklahoma, dated September 30, 1986, affirmed Oklahoma County District Court's Order.

4. Order of the Oklahoma County District Court, dated June 8, 1984, modifying an Order of a state agency based on the jurisdictional authority of the Oklahoma Administrative Procedures Act (OAPA).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2) and (3) ,

§1651 (a) and, violations of Petitioner's rights under provisions in the United States Constitution: specifically, the Contract clause, the Ex Post Facto clause and Thirteenth and Fourteenth Amendments to the United States Constitution.

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONSTITUTION:

ARTICLE 1 SECTION 10

"No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, * * * "

AMENDMENT THIRTEEN

"Neither slavery nor involuntary servitude,except as punishable for crime whereof the party shall have been duly convicted, shall exist within the United States, * * * "

AMENDMENT FOURTEEN

" * * * no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OKLAHOMA CONSTITUTION:

ARTICLE II § 6

"The courts of justice of the State

shall be open to every person, and speed and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

ARTICLE II § 7

"No person shall be deprived of life, liberty or property, without due process of law.

OKLAHOMA STATUTES:

75 O.S. 1981 §301 et seq (a statute of limited jurisdiction)

§314 (c) "No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action and the licensee was given an opportunity to show compliance with all lawful requirments for the rentention of the license. * * * "

§318 (2) The judicial review prescribed by this section, *** shall be afforded by such proceedings taken in accordance with the procedure and under the conditions otherwise provided by law, but subject to the applicable provisions of Sections 319 through 324 of this title, * * *

(The first provision of Section 324, shown below, clearly states that the City of Choctaw was inelgible and barred from in-

voking Section 318 for a "Judicial Review", moreover, the Oklahoma State Department of Health was barred from the use of this statute as authority in its hearings with the City as a Respondent, and with Defendant since he was no longer a party-in-interest).

§324 "This Act shall not apply to municipalities, * * * "

COMMON LAW WRITS:

CERTIORARI, To Supreme Court of the state of Oklahoma, denied.

PROHIBITION, For dismissal for lack of jurisdiction, denied.

VII. STATMENT OF THE CASE

On or about July 1, 1961 Petitioner employed Lee M. Bush, an Oklahoma State registered Engineer to design a sewage system which has become known as Redwood Manors sewage system, who concurrently was engaged in engineering a new sewage system for the old townsite area of the City

of Choctaw. (a suburb of Oklahoma City) Mr. Bush and his partner, Mr. Settle, did all design and engineer work pertaining to plans, permits, etc., which was their responsibility. They worked closely with the City of Choctaw and the Okla. State Department of Health. (OSDH)

On July 26, 1961, Mr. H.L. Townsend, Mayor of Choctaw, signed an "application for Permit" to the Oklahoma State Department of Health (OSDH) for the sewage system which stated therein:

> "THE SEWER SYSTEM IS TO BE CONSTRUCTED BY THE DEVELOPER AND GIVEN TO THE TOWN OF CHOCTAW"

This application is the first part of a "CONTRACT" between the City of Choctaw and the OSDH. See APPENDIX 31 a and 32 a. The second part of the "CONTRACT" is entitled "PERMIT", OSDH, dated August 11, 1961, naming "TOWN OF CHOCTAW" Oklahoma as "PERMITTEE", with certain stipulations therein. Keith L. Morley, Commissioner of

Health, signed for the OSDH. These two instruments constitute an irrefutable VALID CONTRACT between Choctaw and the OSDH. See APPENDIX 31a thru 36a. Both the application and PERMIT CONTRACTS were fraudulently concealed from Petitioner until 1979.

The Supreme Court of Oklahoma said in Max Pray v. Kidd Williams Drilling Corporation, Okl. 352 P. 2d 380 (1960):

> "When we consider the provisions of 15 O.S. 1951 § 137: writing excludes oral negotiations or stipulations.--The execution of a contract in writing, whether the law requires it to be so or not supersedes all oral negotiations or stipulations concerning it's matter, which preceded or accompanied the execution of the instrument."

Further, Petitioner believes statute 15 O. S. 1961, § 75, is applicable here:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent of all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting."

On December 1, 1961, Choctaw and the

Choctaw Utility Authority, a public trust, caused a Prospectus to be printed for the purpose of selling First Mortgage Revenue Bonds. On page 12 of this Prospectus (in the record) it says in part:

> "This development is known as the Redwood Manors Addition. In this Addition, the Developer has constructed a sewer system including sewer lines and treatment facilities to serve 40 building sites. This facility has been approved by the State Health Department and accepted by the Town of Choctaw City." (Emphasis added).

This is a Memorandum Contract. This Prospectus was signed by H.L.Townsend, President, Board of Trustees for Town of Choctaw and he also signed as Chairman of Trustees of the Choctaw Utility Authority. The questioned sewer works was used as security for Choctaw's First Mortgage Revenue Bonds. The term "First Mortgage" connotes a first mortgage lien on this system.

In Fife et al, v. Jackson Material Co., Okl. 125 P. 2d 175 (1942):

> "The general rule that an exhibit governs over the allegations of the petition to which it is attached is applicable when the instrument attached bears upon some issue between the party who invokes it on his adversary.

Mr. L. G. Johnston contributed a number of years service to Choctaw, both as councilman and member of the Planning Commission, he stated in a sworn affidavit: the City was aware of the sewer permit, but did not exercise its responsibility to operate the sewer system: "as long as Mr. Pointon took care of the system, we just let him." See APPENDIX 41a and 42a.

Petitioner was unaware of the sewer "Permit" and "Contract", Choctaw deliberty maneuvered him to maintain their system as long as they could. The Petitioner was an unwitting agent for the City. When he learned from an employee of the Oklahoma County Department of Health, that it was not his responsibility, he ceased his ministerial care.

On May 22, 1980, the OSDH filed a Petition ostensibly under the authority and jurisdiction of the Oklahoma Administrative Procedures Act, 75 O.S. 1981 § 301 et seq., naming Choctaw and Petitioner as Respondents.

On November 3, 1981, the OSDH issued its Final Order, ordering Choctaw and Petitioner to bring the system up to their arbitrary Invalid Standards adopted March, 1980.

On December 2, 1981, Choctaw filed a Petition For Judicial Review of the Final Order of the OSDH in the Oklahoma County District Court, which sat as an appellate Court drawing its presumed jurisdiction from the Face of the Petition citing: 75 O.S. § 318 as its jurisdictional base. The City denied all responsibilty for the system, and ask that the OSDH's Order be modified to absolve the City from its City obligations even though it had signed a

CONTRACT in 1961, with the OSDH and was "PERMITTEE" of the sewer system.

The documents mentioned herein are irrevocable facts binding the city to its responsibility of the system: Plat dedications (in May 1961):

> "* * * streets and easements for road and public utilities,* * * "
>
> which according to 11 O.S. Section 41-109 states:
>
> "When the Plat or map has been completed and certified, acknowledged, approved and recorded * * * the land intended to be used for streets, alleys, ways, commons or other public uses in any municipality's corporate name are held in Trust to and for the uses and purposes set forth and expressed or intended;"

In City of Elk v. Coffey, Okl. 562 P.2d 160 (1977) the Court said:

> "* * * that easements depicted on plat were reserved for installation and maintenance of utilities was unambiguous, * * *"

Then the Court added:

> "The cost of repair and maintenance are duty and right of easement holder if there is no agree-

ment to the contrary; * * *" Lindhorst v. Wright, Okl. 616 P. 2d 450 (1980).

Petitioner maintains the sewer system is provable by irrefutable documentary evidence that it is under the ownership and is the total responsibility of Choctaw and that a critical jurisdictional problem exists: That he does not own this sewer system, therefore, he is not A Part-In-Interest, consequently, the hearings of the OSDH pertaining to him were without subject matter jurisdiction and further any real or implied responsibility of the Petitioner had long since expired by the running of statute of limitations and latches.

The District Court in its Judicial Review and the Oklahoma Court of Appeals, could assume only the jurisdiction of the OSDH, which had not jurisdiction of the Petitioner, since he is an Improper Party. 75 O.S. §§ 324 clearly prohibits the use of this statute for use against a municipali-

ty or for the use of a municipality as authority for judicial review.

In the same Final Order, OSDH revoked a 1962 sewer permit which covered the second phase of the sewer system, which is a large sewer lagoon, built, fenced, manholed ready for use, large enough to sewer a large shopping mall, without a hearing, without taking substantial evidence. There was no violations, since the system had not yet been used. The OSDH arbitrarily and capriciously abused its discretion by cancelling this permit without a cause, said cancellation was affirmed by the county District Court and The Court of Appeals of the State of Oklahoma.

The OSDH usurped 75 O.S. § 314 (c):

> "No revocation, suspension, annulment or withdrawal of any license, is lawful unless, prior to the institution of agency proceedings the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the

> retention of the license. * * *"
> See APPENDIX 43a.

Section 314 (a) was not adhered to, instead the OSDH surreptitiously fraudently cancelled this permit without a legal cause.

> "An administration agency may not under the guise of its rule making power exceed the scope of its authority and act contrary to the statute which is the source of its authority. * * * all orders and rules made by it must conform with the statutes to be valid." Adams v. Professional Practices Commission, Okl. 524 P. 2d 932 (1 972). Also Corp. Comm. v. Okla. State Personnel Board, Okl., 513 P. 2d 116 (1973)

The oft repeated attempted delivery of a deed to the city has been an on going mistruth. The Petitioner submitted to a polygraph test (in the record) to lay to rest this false premise, which Choctaw has interwoven throughout this case creating a false myth. The entire sewage system was constructed on sewer easements (which is customary), No deed was ever necessary.

The opinion mentions the tempory lagoon, all lagoons are considered temporary until such date that they are superceded by a sewer trunk line leading to the main disposal plant. The city in this action covertly cancelled the large lagoon which was not yet in use. The Federal E.P.A. granted the city sufficient funds to upgrade this system during this litigation, but "Special Interest" have influenced the City not to run a trunk line and relieve this lagoon because the short 2½ mile trunk line would open up 10 sq. miles for development to small operators, Tom, Dick and Harry.

Conversely, by cancelling the large lagoon, sewers are denied to a future shopping mall on the same property. In May 1986 the City fraudulently dezoned the property wherein the sewers are in question for the second time, thus, bringing the City's actions in violation of the Rico laws. Stat-

ing further, this travesty with the same basic issues is also lodged in Federal Court, both State and Federal Action are approaching seven years each. See Map of area, APPENDIX 48a.

VIII. REASONS FOR ALLOWANCE OF THE WRIT

The Oklahoma Administrative Procedures Act lacks statutory authority to adjudicate the following:

1. Recision of Contracts, Bond Covenants, Plat Dedications, City easements, ownership of a complete sewage system serving over 200 persons, Cancellation of a Permit (unless in conformity with the provisions of § 314);

2. Title to Leaseholds Real Property and Personal Property;

3. Eminent Domain, Expropriation of Real and Personal Property; (In compliance to the 1981 Standards of the OSDH, the lagoon in question would have to be enlarged by 1½ acres).

4. To summon and adjudicate a municipality under the provisions in § 324; 1/

5. Nor is it a proper statute for a municipality to invoke and file a legal action (Judicial Review) against a defendant in contradiction to § 318 and § 324, Nor does it grant jurisdiction of a legal action against an improper party who is no longer a party-in-interest of this sewage system; 2/

A similar case in point is: Civil Serv. Com'n of City of Tulsa v. Gresham, Okl. 6 53 P. 2d 920 on page 924 (1982) The Oklahoma Supreme Court stated:

> "* * * and since the administratives Procedures Act specifically excludes municipalities from its terms (75 O.S. 1981, § 324). Neither that Act nor the cases construing its requirements as findings apply here. * * *"

1/ In "Oklahoma Law Review 1978", Michael P. Cox wrote a treatise entitled, "The Oklahoma Administrative Procedures Act: Fifteen years of Interpretation." On page 888 Mr. Cox states: "* * * The Act specifically does not apply to municipalities, * * *"

6. Nor does it grant authority to arbitrarily and capriciously cancel an unused fully constructed sewage lagoon, without a hearing, contrary to § 314; None of the hearings held, pertained to this lagoon which is on a separate permit on the same property; this permit should be restored to its useful status. See Aerial Photo of lagoons APPENDIX 47a.

It is clear from the above that from the inception of this entire action, the OSDH lacked jurisdiction of its administrative Procedures hearings, the County District Court, setting as appellate, had no jurisdiction, hence the Court of Appeals of the State of Oklahoma was without jurisdiction. This entire case from its origin

2/ In a treatise: "Oklahoma's New Administrative Procedures Act," by Maurice H. Merrill, Okl. Law Review Vol. 17, 1964, page 7, Merrill says: "The intent of the draftsman to exclude from the coverage of the Act all municipal corporations and political subdivisions of the state and their agencies is clear. * * *"

is a case of judicial coercion which has never had valid jurisdiction of the parties or the subject matter.

The Court was adamant about just such abuse, in Adam v. Professional Practices Commission, Okl. (1972) 524 P. 2d 932, it said:

> "An administrative agency may not under the guise of its rule making power exceed the scope of its authority and act contrary to the statute which is the source of its authority." * * * all orders and rules made by it must conform with the statutes to be valid."

In State v. Corporation Com's, (Okl. 1979) 590 P. 2d 647, the Supreme Court of Oklahoma said:

> "The three jurisdictional prerequisites to any valid judgment are: (1) jurisdiction over the parties, (2) jurisdiction of the general subject matter, (3) jurisdiction or power to render the particular judgment."

It is clear that the Oklahoma Courts lacked all three prerequisites.

In Silver Falls Timber Co., 286 P. 527 Okl. (1930), the Court stated:

> "A verdict rendered by the direction of the Court in a case where the Court is without jurisdiction is a legal nullity."

In addition to the many other inequities of this case, the OSDH's Final Order, and affirmed by the subsequent Courts, has mandated that the sewage system be rebuilt to conform to unconsitutional arbitrary Standards adopted in March 1980, the system was built in 1961 in conformity to the Standards at that time.

Petitioner challenged the constitutionality of the 1980 Standards to the Supreme Court of the State of Oklahoma who denied a review.

Mr. Michael Cox, supra, cast a pall over the constitutionality of O.S. 75 Section 308: See APPENDIX 49a and 50a.

Petition for Certiorari should be granted mandating the Supreme Court of the State of Oklahoma to quash and dismiss this action pursuant to 28 USC § 1651, when Petitioner has no other adequate means to ob-

tain relief and his right to relief is and undisputable.

The Supreme Court of the State of Oklahoma refused by denying Certiorari of Petitioner to correct the clear abuse of discretion in the "Opinion" (believed to have been written by Choctaw) of the Court of Appeals of the State of Oklahoma.

A similar case was Adam v. Saenger, (1938) 303 US 59, 82 L ed 649, 58 S Ct 454 reh den 303 US 666, 82 L ed 1123, 58 S Ct 640:

> "An action brought in Texas to recover on a California judgment, in which the trial Court sustained a general demurrer to the complaint, the Texas Court of Civil Appeals affirmed, and a petition to the Texas Supreme Court for a writ of error was denied for want of jurisdiction, the United States Supreme Court, in reversing judgment of the Texas Court of appeals, said that its writ of certiorari was properly directed to that court because it was the highest court of the State in which a judgment could be had."

In the alternative Petitioner request that this Court assume jurisdiction under 28 USC § 1257 (2) and (3), because this action is a sham suit filed in bad faith which has been meritless and frivolous, amounting to vexation, harassment, and needless expense for Petitioner, casting unecessary burdens on the courts and has violated Petitioner's Federal Rights by:

a. Use of an Unconstitutional Rule: The 1980 Standards of the Oklahoma State Department of Health;

b. The Oklahoma Courts would force-mandate Petitioner to add 1½ acres of land, spend large sums of money, and operate a sewage system that clearly is the property of the City of Choctaw, thus, sentencing Petitioner to involuntary servitude, in violation of the Thirteenth Amendment;

c. By expropriating land and money as aforestated in b. which clearly violates the Fourteenth Amendment of taking proper-

ty without due process of law; No due process was afforded Petitioner, at all times the Oklahoma Courts lacked jurisdictions.

d. The judgment would force - mandate Petitioner to remodel a sewage system to O SDH's 1980 Standards, Which would force Petitioner back to 1961 when he originally constructed the system, thereby in violation of the ex post facto provision of the United-States Constitution; and, the Oklahoma Courts in their judgments, seek to rescind the sewer "Contract" between the City of Choctaw and the OSDH, which is a Clear violation of the Contract Clause of the United States Constitution.

The 1980 Standards are similar to the jurisdictional case of Cox Broadcasting Corp. v. Cohen, 420 U.S. L Ed. 2d, 328,338, 95 S Ct. 1029 (1975):

> "(a) The constitutionality of the Georgia statute was 'drawn in question' within the meaning of § 1257 (2), * * * the statute was drawn in question in a manner directly bearing upon the merits of

> the action, and the decision upholding its constitutional validity invokes this Court's appellate jurisdiction."

CONCLUSION

It is time to lay to rest this travesty that has come to be known as the "CHOCTAW AFFAIR", that began without jurisdiction as a hearing, ostensibly, under the Oklahoma Administrative Procedures Act.

The present Opinion of The Court of Appeals of the State of Oklahoma as a result of its ruling may sua sponte, arbitrarily reconstrue a statute of limited jurisdiction to adjudicate all manner of law, if allowed to stand.

This Court should issue a Writ of Certiorari to the Supreme Court of the State of Oklahoma to review the decision of The Court of Appeals of the State of Oklahoma with appropriate instructions to dismiss same for lack of jurisdiction, or,

In the alternate, this Court should

take jurisdiction of this case and review it on the merits or, summarily dismiss it from the action in the State Courts, for lack of jurisdiction. Petitioner requests that costs of this action and attorney's fees be taxed to Choctaw and the OSDH.

Respectfully submitted,

William P. Pointon, Jr.,
Attorney pro se
P.O. Box 4130, Nicoma Park, Okl. 73066
(405) 769-3365

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA, COUNTY OF OKLAHOMA, ss:

I, William P. Pointon, Jr., depose and say that I am attorney pro se herein being duly sworn, states: that forty copies of the Petition For Writ of Certiorari addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543, and three copies of same were deposited in a U.S. Post Office March 9, 1987, first class, postage prepaid

or hand delivered, to each of the parties required to be served, as follows:

James W. Patterson, Clerk of the Supreme Court of the State of Oklahoma, Honorable Robert D. Simms, C.J., Honorable John B. Doolin, V.C.J., Honorable Ralph B. Hodges, J., Honorable Robert E. Lavender, J., Honorable Rudolph Hargrave, J., Honorable Alma Wilson, J., Honorable Yvonne Kauger, J., Honorable Hardy Summers, J., Honorable Marian P. Opala, J., Justices of the Supreme Court of the State of Oklahoma, Oklahoma State Attorney General, all of above addresses, at the main State Capitol Building, Oklahoma City, Oklahoma;

Margaret McMorrow-Love, 24th Floor First National Center, Oklahoma City, Okl.73102. Ted Pool, 511 Couch Dr. Suite 300, Okl. City, Okl. 73102, attorneys for Choctaw;

William Gorden, P.O. Box 53551 Okla. City, Okla. Attorney for OSDH.

I further certify that copies of the foregoing Petition for Certiorari were filed in the Office of the Court Clerk of Oklahoma County on this 9th day of March, 1987.

All parties required to be served have been served.

William P. Pointon, JR.

Subscribed and sworn before me on March 9, 1987.

William P. Pointon, JR.
Attorney pro se
P.O. Box 4130
Nicoma Park, Okl. 73066
(405) 7693365

My commission expires May 1, 1988

Notary Public Camille Baker

APPENDIX

IN THE SUPREME COURT OF THE

STATE OF OKLAHOMA

Dec. 16, 1986.

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

62,668 - City of Choctaw v. State of Oklahoma ex rel. Oklahoma State Department of Health et al.
Certiorari denied.
CONCUR: Simms, C.J., Doolin, V.C.J., Hodges, Lavender, Hargrave, Wilson, Kauger, Summers, JJ.,
DISSENT: Opala, J.

(Simms)
Chief Justice

Certified: 3-9-87, James Patterson, Okl. Supreme Ct. Clerk.

RELEASE FOR PUBLICATION IN OKLAHOMA BAR JOURNAL
BY ORDER OF COURT OF APPEALS
THE COURT OF APPEALS, DIVISION 1, STATE OF OKLAHOMA

October 14, 1986

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

62,668 - City of Choctaw, Plaintiff-Appellee v. State of Oklahoma ex rel Oklahoma State Department of Health; Water Facilities Engineering Service, Defendant-Appellee-Appellant and W. P. Pointon, Jr., an Individual, Defendant-Appellee-Appellant.

Appellant's, W.P. Pointon, Jr., Petition for Rehearing is DENIED.

(Karl R. Gray)
Presiding Judge

Certified: James Patterson, Okl. Supreme Ct. Clerk, 3-9-87.

NOT FOR PUBLICATION

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
Division No. 1

CITY OF CHOCTAW,	)	
	)	
Plaintiff-Appellee	)	
	)	
versus	)	No. 62,668
	)	
STATE OF OKLAHOMA ex rel. OKLAHOMA STATE DEPARTMENT OF HEALTH: WATER FACILITY ENGINEERING SERVICE,	)	
	)	
Defendant-Appellee	)	
	)	
and	)	
	)	
WILLIAM P. POINTON, JR.,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JAMES B. BLEVIN, DISTRICT JUDGE

AFFIRMED

W. P. Pointon, Jr.,
Midwest City, Oklahoma, Pro se,

Ted N. Pool,

Del City, Oklahoma,
Margaret McMorrow-Love
Oklahoma City, Okl. For Appellee Choctaw,

William W. Gorden, For Appellee

Oklahoma City, Oklahoma, OSDH,

Opinion by Patricia D. Robinson, Judge:

This case involves the question of the ownership, operation and maintenance of a sewage lagoon system constructed and maintained by Appellant from 1961 to 1979. The controversy was initiated with a petition by the Oklahoma State Department (Department of Health naming as respondents, William P. Pointon, Jr., (Appellant) and Appellee, City of Choctaw (City). On November 3, 1981, the Department entered its final order. The Department's order stated that since the facility was already built, Appellant was to provide the "as built" plans for the facility. He was also required to provide engineering plans and specifications to bring the facility up to date as to the date of issuance of the permit, 1961. Appellee, City of Choctaw, however, was required to operate the site from the date of the order and both Appellee City

and Appellant were required to do the construction work to accomplish the plans and specifications. Thereafter the City filed a Petition for Judicial Review of the Department's order to the District Court. Appellant filed two pleadings in the District Court entitled "Answers and Counterclaims". The City responded by filing a Demurrer or Motion to Strike these pleadings which was sustained. Appellant's appeal from that decision was dismissed by the Supreme Court. Appellant also filed an Application for Original Jurisdiction which was denied by the Supreme Court. The appeal of the City to the District Court was sustained on June 7, 1984. The order of the District Court differs only in four respects from the original Department of Health Administrative order:

1. The plans and specifications for construction of the facility must be brought up to meet the standards of 1981 instead of 1961;

2. the construction is solely to be the

responsibility of Appellant;

3. no responsibility for operation is mentioned; and

4. the permit issued by the Department January 15, 1962, to the City is vacated and held for not.

Appellant now appeals the District Court's order.

Prior to 1961 City approved a certain plat submitted by Appellant for the construction of the Pointon Redwood Manor Addition. Appellant employed the services of an engineer to issue a plan and report to the Department and said report was prepared by the engineer and paid for by Appellant. City applied for and received a permit for a temporary sewage lagoon system and sewage collection lines to serve the property to become known as the Redwood Manors Addition. The report of the engineer was accompanied by the application for the permit and stated that it was the intention of Appellant to dedicate the lagoon and lines to the City after construction was

completed. The City applied for the permit pursuant to the then understood Department's policy requiring the City to apply for the permit although construction was to be completed by Appellant. The permit granted was for a temporary discharge lagoon system in the northeast corner of the development. The engineer staked the land for the benefit of Appellant but the land was, at the request of Appellant, not staked in accordance with the plans as drafted and submitted to the Department on behalf of Appellant. In addition, "as built" plans of the actual installation of the temporary lagoon system were not submitted to the Department by Appellant nor was the Department notified of the completion of the project. Substantial unapproved changes were made to the system by Appellant. Between September of 1961 and September of 1974, Appellant constructed three additional lagoon cells and a transfer pump. He did not

apply for nor did he receive a permit from the Department for these changes and modifications. In addition, he did not inform, consult or obtain the consent of the City to the changes that he was making in the lagoon system. The additional construction changed the temporary discharge system into a total retention system. The Department became aware of the lagoons and the transfer pump addition by Appellant in 1974 but did not complain about the changes until 1980.

From the year 1961 through 1979 Appellant operated and maintained the facility as a private sewage system and collected and retained all sewage fees assessed by him from the residents of the Redwood Manor Addition. During the hearings at the Department, Appellant asserted that in 1979 he had a deed by which he, or one of his corporations, attempted to convey to the City some of the property upon which the

lagoon and some of the sewage collection lines were located. He testified that in 1961 he was the owner of the sewage system and conveyed the same to Pointon Realty, who in turn conveyed it to Private Roads, Inc., of which Pointon is the president and sole stockholder. He stated that he had no knowledge or information regarding whether the City accepted any "conveyance" and testified that he never informed the City that he was filing an easement. The City asserts that they never accepted the sewage system and it did not maintain, operate or collect fees on the system from its inception. From 1961 to 1979, Appellant never attempted to deed any property concerning the sewage system to the City but rather operated the system as a private enterprise.

The issues before this Court are whether the record sustains the findings by the District Court that Appellant is re-

sponsible for preparing as "built Plans" for the sewer system; preparing plans and specifications for bringing the system up to the 1981 standards and further, whether the record sustains the finding that Appellant shall bear all financial responsibility for the performance of needed construction work to bring the facility into compliance with the 1981 standards and to create and prepare a proposed program of minimal construction, upkeep and repair of the system subject to the approval of the Oklahoma State Department of Health.

Appellant presents numerous questions for review. Certain of Appellant's propositions are overlapping and we will address them accordingly.

First, Appellant argues that the District Court failed to consider certain evidence that he presented including the permit issued by the Department, an affidavit by a former council member of the City of

Choctaw, and a 1961 prospectus of the City. He then reaches the conclusion that the District Court's ruling is therefore against the weight of the evidence. Apparently Appellant thinks that since the ruling was unfavorable to him that it necessarily follows that the Court either failed to consider the evidence he presented or disregarded it entirely. This case is governed by the provisions of the Administrative Procedure Act of Oklahoma, 75 O.S. 1981 §301 et seq. This Act governs the procedure for initiating a judicial review of an administrative order as well as the scope of that review. 75 O.S. 1981 §§318 and 323. The reviewing District Court must review the entire record to determine if there is "substantial evidence" to sustain the finding of the agency. Brown v. Banking Board, 512 P.2d 166 (Okl. 1973). If the facts determined by an agency are supported by the substantial weight of the evi-

dence, the decision of the agency should be affirmed. Tulsa Area Hospital Council v. Oral Roberts Univ., 626 P.2d 316 (Okla. 1981).

After reviewing the record we agree with the District Court that the Department's original order was against the substantial weight of the evidence.

Next, Appellant asserts that both the agency and the District Court lacked jurisdiction over the subject matter of the action and lacked in personam jurisdiction over Appellant since he was not "a real-party-in-interest". Appellant did not seek to quash the issuance of the summons but rather appeared both in the Department level and in the District Court where he sought affirmative relief. Since he sought affirmative relief against the opposing party, he submits himself to the jurisdiction of the court for all purposes in the action and is estopped from questioning the

court's jurisdiction in the first instance. Rodgers v. Rodgers, 165 P. 2d 986 (Okl. 1946). Appellant was also a real party in interest both at the Department level and in the District Court. A real party in interest under the Administrative Procedure Act is a person named and participating in an individual proceedings. First National Bank v. Oklahoma Savings & Loan Board, 569 P.2d 993 (Okl. 1977). Appellant was clearly named by the Department and he participated fully in the proceedings by way of testimony and evidence. In addition, he appeared in the action in District Court, brought numerous appeals and proceedings in the Supreme Court and sought affirmative relief in the District Court.

Appellant contended in the District Court that the Court lacked subject matter jurisdiction because the Department lacked subject matter jurisdiction. The Department has jurisdiction over sewage lagoon systems

pursuant to the provision of 63 O.S. 1981 §1-908. The Department is vested with jurisdiction over any person found to be in violation of any of the provisions of the code governing sewage disposal systems. A permit issued by the Department is not a prerequisite to the Department's jurisdiction. Attorney General Opinion No. 78-295 (Dec. 23, 1978). Therefore merely because a permit was not issued in Appellant's name individually did not divest either the Department or the Court of subject matter jurisdiction. Appellant constructed, operated, and maintained the system from 1961 through 1979 and the Department has jurisdiction over such system. Therefore, subject matter jurisdiction is present. The District Court also had jurisdiction pursuant to 75 O.S. 1981 §318 which provides that a person aggrieved from a final order of an agency shall be entitled to judicial Review.

Appellant argues that his counterclaims and Petition for Review were improperly dismissed. Appellant's counterclaims were brought under a broad number of categories, from tort to contract, from civil rights to fraud, and allegations of criminal activity, all against the City and the Department. These actions were not cognizable under the aegis of an administrative appeal, where none of them had been raised at the administrative level nor were they capable of being so raised under the Administrative Procedures Act 75 O.S. 1981 §301 et seq. The District Court was sitting as an appellate court and not as a court of Original Jurisdiction and therefore new requests for affirmative relief were inappropriate. The ruling of the District Court dismissing the Appellant's counterclaims was correct.

Appellant also complains that his Petition for Judicial Review filed in the Dis-

trict Court was incorrectly dismissed as being untimely. Appellant filed a Motion for New Trial or Motion to Reconsider with the Department which was denied on November 23, 1981. The City filed its appeal on December 2, 1981 in the District Court. Service was had on Appellant on December 9, 1981. Appellant did not file any pleadings with the District Court until an Answer and Counterclaim on December 31, 1981. At that time he also filed a petition for judicial review and an application for stay which was denied by the Court.

An appeal from an adverse decision of an administrative agency is governed by 75 O.S. 1981 §318 which provides that it must be filed within thirty days after the Appellant is notified of the order. In his Motion for Stay, Appellant stated that he received the order of the Department on November 4, 1981. Thus, in order to have filed a timely appeal the Petition for Re-

view had to be filed on or before December 4, 1981, but was not filed until December 31, 1981. Further, if his "appeal" to the Department stayed the appeal time, then he still had to file by December 23, 1981 not December 31, 1981. When an appeal is not timely filed, appellate courts lack jurisdiction. Conoco, Inc. v. State Department of Health, 651 P.2d 125 (Okl. 1982); Citizens' Action for Safe Energy, Inc., v Oklahoma Water Resources Bd., 598 P.2d 271 (Okl. App. 1979).

Appellant further argues that he did not personally receive timely notice of the Department's overruling of his "Motion for New Trial". Appellant has never asserted that his counsel did not reveive notice. In all stages of the Department hearings and in the District Court, Appellant was represented by counsel. It is only on this appeal that he is appearing pro se. Notice to counsel is notice to an Appellant for

the purposes of determining whether a notice of appeal is timely filed. Harlan v. Graybar Electric Co., 442 F. 2d 425 (9th Cir. (1971).

Appellant's next contention is that both the City and the Department have engaged in malicious prosecution and an abuse of process. The five elements that must be established for a malicious prosecution action are:

1. The bringing of an action;
2. its successful termination in favor plaintiff;
3. want of probable cause;
4. malice; and
5. damages.

Lewis v. Crystal Gas Co., 532 P. 2d 431 (Okl. 1975). The action by the Department in the appeal by the City have not been terminated in favor of Appellant. In addition, Appellant cannot show a want of probable cause on behalf of the Department for bringing a petition after a citizen had

complained about the condition of the sew-lagoon system.

To bring an action for abuse of process, the elements are:

1. That the defendant made an illegal, improper or perverted use of process;

2. that he had ulterior motives; and

3. that damages resulted.

The abuse of process must be the illegal service or use of process and not the underlying basis of the cause of action. Neal v. Pennsylvania Life Insurance Co., 480 P. 2d 923 (Okl. 1970). Appellant does not assert that a process of the court was used for an unauthorized or improper method.

Next, Appellant argues that the statute of limitations and the doctrine of laches bars this proceeding. Appellant cites no specific Statute of Limitations which was violated.

The doctrine of estoppel, on the other

hand, is based upon one party being prejudiced by relying on the acts, silence or omissions of another. Wattie Wolfe Co. v. Superior Contractors, Inc., 417 P. 2d 302 (Okl. 1966). Equitable estoppel against the State is only appropriate in exceptional circumstances where public policy and interest so dictate. Harris v. State ex rel. Oklahoma Planning and Resources Bd., 251 P.2d 799 (Okl. 1952). Under the facts of this case, Appellant's plea of estoppel cannot be sustained.

Appellant's next proposition of error is that he conveyed the sewage lagoon system and all additions and modifications thereto to the City and that therefore the City was solely and exclusively responsible for its maintenance. Appellant bases this conclusion upon the temporary 'permit' as well as the laws of Oklahoma governing easements and dedications to municipalities. The City asserts that the temporary

lagoon system and the three cells which were added thereto were never conveyed, dedicated or accepted by the City of Choctaw. Appellant relies upon the fact that a permit had been issued in the name of the City. Appellant testified that in 1961 he was the owner of the system and conveyed the same to one of his corporations. Appellant contracted for the construction of both the original lagoon system and all modifications thereto. He arranged and contracted for the construction of all the sewage lines and arranged for having the lines staked. He collected and retained all fees from home owners with reference to the sewage system. He added to the original temporary lagoon system to make it a full retention system which were not in accordance with the plans submitted to the Department nor did Appellant obtain a permit from the Department for these changes and modifications, nor did he inform the City

thereof. The mere fact that a permit was issued in the name of the City does not make the City responsible for the system, in light of the fact that Appellant from 1961 to 1979 operated the system, modified the system and collected and retained all fees with reference to the system.

Appellant also contends that he either by the plat or by his efforts in 1979 to deed the sewage system to the City, the City became the owner and thus is liable for its operation and upkeep. The plat states the owner "dedicates to the public use the streets and easements for road purposes and public utilities..." Language of this nature does not convey fee title of any property to a municipality as only words of grant or conveyance are used to pass title. Town of Reydon v. Anderson, 649 P.2d 541 (Okl. 1982); Board of Trustee of Town of Taloga v. Hadson, 574 P.2d 1038 (Okl. 1978). For a dedication or easement

to be effective, there must be an intent on the owner to dedicate the land for public purposes and, a specific acceptance of that dedication by the City. City of Ardmore v. Knight, 270 P. 2d 325 (Okl. 1954). The rationale being that a municipality should not have undesirable properties thrust upon it with all the burdens attendant to that property without some specific action on its part showing acceptance. Oklahoma City v. Williamson, 90 P.2d 1064 (Okl. 1939). The record reflects that the City of Choctaw took no affirmative action to accept any deed attempted to be conveyed by Appellant in 1979, thus there was no valid passage of title.

Because Appellant alone directed and controlled this sewage system from 1961 to 1979 reaping all pecuniary benefits therefrom, we find that the system in question is owned as a private system by Appellant. Such private ownership is allowed in Okla-

homa. Jacobson's Lifetime Buildings, Inc., v. City of Tulsa, 333 P. 2d 307, 310 (Okl. 1958). The City's initial participation stemmed only from an informal Department policy that the potentially affected municipality be named on the permit. Because the system has been and presently remains a private system, the District Court was correct in finding that APPellant was to bear the financial responsibility for bringing the system into compliance with Department rules and requlations.

Appellant next argues that he was injured by an act of "fraudulent concealment" based on the fact that a permit was issued to the City. Fraud is never presumed but must be established by clear and convincing evidence of the party alleging fraud. Fraud consists of a material misrepresentation that is false; that the plaintiff knew it was false when it was made; and that it was made with the intent that the other

party rely upon it and that the party did rely, in fact, upon it to its detriment. State of Oklahoma ex rel. Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okl.1973); Brooks v. Lagrand, 435 P.2d 142 (Okl.1967). The record reflects that it was Appellant's engineer who submitted the plans and specifications together with the permit to the Department. No misrepresentations were made to Appellant by the City.

Lastly, Appellant asserts a variety of allegations concerning alleged constitutional violations of due process, equal protection, violations of ex post facto laws, bills of attainder, impairment of contracts and penal servitude. A bill of attainder is a legislative act which inflicts punishment on named individuals or members of an easily identifiable group without judicial trial. Board of Regents v. Updegraff, 237 P. 2d 131 (Okl. 1951). Here there is no legislative act involved and therefore a

bill of attainder or an ex post facto law does not exist. Also his argument of impairment of contract is without merit since no contract existed which could be impaired.

During four days of hearings before the Department, Appellant appeared, was represented by counsel, was allowed to examine and cross-examine witnesses and produce exhibits. The same applies in the District Court. Appellant was given notice and an opportunity for hearing and therefore due process was afforded to him.

For all the above stated reasons we find that the order of the District Court is correct and is hereby affirmed.

AFFIRMED.

Gray, P.J. and REYNOLDS, J. concur.

Certified: James Patterson, Okl. Supreme Ct. Clerk, 3-9-87

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

CITY OF CHOCTAW,	)	
	)	
Plaintiff-Appellant,	)	
	)	No.
vs.	)	CJ-81-5741
	)	
STATE OF OKLAHOMA, EX REL OKLAHOMA STATE DEPARTMENT OF HEALTH: WATER FACILITIES ENGINEERING SERVICE AND	)	
	)	
WILLIAM POINTON, JR.,	)	
	)	
Defendants-Appellees	)	

ORDER

This cause comes on to be heard on the brief of the City of Choctaw, Plaintiff-Appellant; the brief of the State of Oklahoma, Defendant-Appellee; the brief of William P. Pointon, Jr., Defendant-Appellee and the reply brief of the City of Choctaw, Plaintiff-Appellant.

On consideration whereof it is ordered by the Court that William P. Pointon, Jr., Defendant-Appellee, the owner of the sewage lagoon system in Pointon's Redwood

Manor Addition to the town of Choctaw City being a part of the Southeast Quarter (SE 1/4), Section Five (5) Township Eleven (11) North, Range One (1) West of the Indian Meridian, Oklahoma County, Oklahoma, shall cause to be prepared, by a licensed engineer, for submission by the City of Choctaw to the Water Facilities Engineering Service of the Oklahoma State Department of Health, the following:

1. As-built plans of the entire sewage lagoon system located in the above described addition which is to include the location of the individual sewage lines in Block One (1), within seventy (70) days from the date of this order; and,

2. Plans and specifications which will bring the sewage lagoon system and main sewer lines into compliance with design standards and rules which were in effect on November 3, 1981, within a reasonable amount of time, said time not to

exceed six (6) months from the date of this order.

It is further ordered by the Court that upon issuance of the permits by the Water Facilities Engineering Service of the Oklahoma State Department of Health to William P. Pointon, Jr., Defendant-Appellee, he shall accomplish any needed construction work, and in addition thereto a proposed program of minimal construction work, intensive upkeep and repair subject to approval by the Water Facilities Engineering Service of the Oklahoma State Department of Health.

It is further ordered by the Court that Plaintiff-Appellant and Defendant-Appellee shall execute any agreements necessary, within the bounds of standard engineering practice, to effectuate this order.

It is further ordered by the Court that the permit issued by the Water Facil-

ities Engineering Service of the Oklahoma Department of Health on January 15, 1962, to the town of Choctaw is vacated and held for naught.

Dated this 7th day of June, 1984.

(James B. Blevins)
District Judge

Certified 9-26-1984, Dan Gray, Court Clerk
By Em Hepson, Deputy

APPLICATION FOR PERMIT

TO THE OKLAHOMA STATE DEPARTMENT OF HEALTH

OKLAHOMA CITY, OKLAHOMA

Date 7/26/61

Sir:

The Town of Choctaw, proposes the construction of Sanitary Sewers & Temporary lagoon To Serve Pointon Redwood Manor Addn. and, as required by Title 63, Sections 613, 614 and 615, Oklahoma Statutes 1941, hereby makes application to the State Department of Health for approval of plans and for permit to proceed with this work. Plans and specifications in duplicate, together with a copy of the engineer's report of the proposed installation, accompany this application,

IMPORANT: These plans and specifications have been approved by the proper city officials and a letter signed by the consulting engineer is in our files stating that all pertinent information affecting the

project is presented in the engineering report, plans and specifications accompanying this application.

It is proposed to let contracts about,

Near future.

Total estimated cost of this project is

16,586.90.

Remarks: THE SEWER SYSTEM IS TO BE CONSTRUCTED BY THE DEVELOPER AND GIVEN TO THE TOWN OF CHOCTAW.

(H.L. Townsend)
Mayor or Chairman of Board

ODH FORM NO. 534

Certified: James Patterson, Okl. Supreme Ct. Clerk, 3-9-87, instrument filed 10-27-86.

(Great seal of the State of Oklahoma)

PERMIT

OKLAHOMA STATE DEPARTMENT OF HEALTH
OKLAHOMA CITY 5,OKLAHOMA

Page 1 of 2 pages. Date August 11, 1961.

The Town of Choctaw, Oklahoma having complied with the requirements of the law is hereby granted permission to construct a sanitary sewage system to serve REDWOOD MANOR ADDITION to Choctaw, Oklahoma, to be constructed in accordance with the plans and specifications approved by this Department on August 10, 1961, subject to the following provisions

1) That all details relative to the project not covered in the plans and specifications as approved will be constructed and accomplished in accordance with good public health practice.

2) That the recipient of the permit is re-

sponsible that the project receive supervision and inspection by competent and qualified personnel.

3) That any notation or changes recorded on the official approved set of plans and specifications in the State Department of health files shall be a part of the plans as approved.

4) That this office will be notified approximately ten days prior to completion of the project so that a final inspection can be made by an Engineer from this Department before final payment is made to the contractor.

5) That the issuing of this permit does not relieve the responsible parties from any damage which may occure as the result of the location and operation of the plant in this area.

(Great seal of the State of Oklahoma)

PERMIT

OKLAHOMA STATE DEPARTMENT OF HEALTH
OKLAHOMA CITY 5, OKLAHOMA

Pages 2 of 2 pages. Date August 11, 1961.

The town of Choctaw, Oklahoma having complied with the requirements of the law is hereby granted permission to construct a sanitary sewage system to serve REDWOOD MANOR ADDITION to Choctaw, Oklahoma, to be constructed in accordance with the plans and specifications approved by this Department on August 10, 1961, subject to the following provisions:

6) That the total number of homes connected to the temporary lagoon shall not exceed forty (40), after which the lagoon will be moved to a new location on the west side of the development.

7) That no house will be built on the lots on the South side of Regency Street until the temporary lagoon has been moved.

Kieth L. Morley)
Commissioner of Health

Loyd Trummill)
State Sanitary Engineer

Certified: James Patterson, Okl. Supreme Ct. Clerk, 3-9-87, instrument filed 10-27-86.

APPLICATION FOR PERMIT

TO THE OKLAHOMA STATE DEPARTMENT OF HEALTH
OKLAHOMA CITY, OKLAHOMA

Date 12/27/1961

Sir:

The Town of Choctaw, Oklahoma proposes the construction of sanitary sewers and sewage lagoon for Pointon's Redwood Manor Addition to the Town of Choctaw, Oklahoma and, as required by Title 63, Sections 613,614 and 615, Oklahoma Statutes 1941, hereby makes application to the State Department of Health for approval of plans and for permit to proceed with this work. Plans and specifications in duplicate, together with a copy of the engineer's report of proposed installation, accompany this application.

IMPORTANT: Those plans and specifications have been approved by the proper city officials and a letter signed by the consulting engineer is in our files stating

that all pertinent information affecting the project is presented in the engineering report, plans and specifications accompanying this application.

It is proposed to let contracts about

Immediately.

Total estimated cost of this project is

$7,500.00.

Remarks

Certified: James Patterson, Okl. Supreme Ct. Clerk 3-9-87, instrument filed 10-27-86.

(H. L. Townsend)
Mayor or Chairman of Board

ODH FORM NO. 534

(Great seal of the State of Oklahoma)

PERMIT

OKLAHOMA STATE DEPARTMENT OF HEALTH
OKLAHOMA CITY 5, OKLAHOMA

Date January 15, 1962.

The Town of Choctaw, Oklahoma having complied with the requirements of the law is hereby granted permission to construct sanitary sewers and a sewage lagoon to serve the Pointon's Redwood Manor Addition to Choctaw, Oklahoma, to be constructed in accordance with the plans and specifications approved by this Department on January 15, 1962, subject to the following provisions: 1) That the sewage lagoon is adequate to serve 65 houses, the stage of the development, proposes for this addition in the letter of December 26, 1961 from Lee M. Bush & Company.

2) That no additional houses beyond 65 will be connected to the system until the second stage of the development has been presented and received approval from this Department.

3) That this Department will receive for our files, copies of the agreements between Mr. Pointon and the Town of Choctaw, concerning ownership of the sewage and water systems.

4) that houses will not be built on the lots adjacent to the lagoon, viz.: Lots 1 through 18, Block 19; Lots 19, 20 & 21, Block 15; and Lots 16, 17, 18 & 19, Block 12.

5) That this office will be notified approximately 10 days prior to the completion of this project to allow inspection of the lagoon and appurtenances before the facilities are placed in service.

Kieth L. Morely,) Commissioner of Health
ODH form no. 535 Certified: James Patterson, Ct. Clk., instrument filed 10-27-86.

AFFIDAVIT OF L. G. JOHNSTON

STATE OF OKLAHOMA, COUNTY OF OKLAHOMA: ss:

I, L. G. Johnston, of lawful age, being first duly sworn, deposes and says as follows: That I served on the Choctaw Planning Commission from 1967 to 1971, then again from 1977 until 1979 and on the City council from 1971 until 1976. During this time the City was aware of the State Health Department Permit for the sewer system at Pointon's Redwood Manors Addition was made to the City of Choctaw. AS long as Mr. Pointon took care of this system, we just let him. We did not exercise our responsibility to maintain and operate the system. We had discused informally about some day purchasing his water system but we knew the sewer system belonged to the City of Choctaw.

(L.G. Johnston)

Subscribed and sworn ot before me this

20th day of November, 1981

Reba Mae Doull, Notary Public

My Commission expires Feb. 18, 1985

STATE OF OKLAHOMA, COUNTY OF OKLAHOMA,ss:

Before me, the undersigned a Notary Public in and for said County and State on this 20th day of November, 1981 personally appeared L. G. Johnston to me known to be the identical person who executed the with in and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for uses and purposes therin set forth.

Given under my hand and seal of office the day and year last above written.

My Commission expires Feb 18, 1985,

Reba Mae Doull, Notary Public.

Certified: James Patterson, Okl. Supreme ct. Clerk 3-9-87, instrument filed 10-27-86.

OKLAHOMA ADMINISTRATIVE PROCEDURES ACT

75 O.S. 301 et seq.

Section 314

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.*

* *

Section 318

(2) The judicial review prescribed by this section, as to orders rendered in individual proceedings by agencies whose orders are made subject to review under constitutional or statutory provision, by appellate proceedings in the Supreme Court of Oklahoma, shall be afforded by such proceedings taken in accordance with the

procedure and under the conditions otherwise provided by law, but subject to the applicable provisions of Sections 319 through 324 of this title, * * *

Section 324

This Act shall not apply to municipalities, counties, school districts, and other agencies of local government; nor to specialized agencies, authorities, and entities created by the legislature, performing essentially local functions, * * *

(The question also arises does it apply to the Oklahoma State Department of Health?)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

CITY OF CHOCTAW,	)	
	)	
Plaintiff-Appellant,	)	
	)	No.
v.	)	CJ 81-5741
	)	
STATE OF OKLAHOMA ex rel OKLAHOMA STATE DEPARTMENT OF HEALTH: WATER FACILITIES	)	
	)	
ENGINEERING SERVICE and WILLIAM P. POINTON, JR.,	)	
	)	
Defendants-Appellees.	)	

PETITION FOR JUDICIAL REVIEW
From Final Order of Oklahoma State Department
of Health: Water Facilities Engineering Service

Comes now the City of Choctaw, a municipal corporation organized and existing under the laws of the State of Oklahoma, and pursuant to 75 O.S. 1971, §318, appeals, in part, the Order of defendant, Oklahoma State Department of Health: Water Facilities Engineering Service ("Health Department") entered on November 3, 1981. Specifically, plaintiff appeals that portion

of the order which adopts the findings of facts and conclusions of law of the Hearing Examiner without the modifications requested by plaintiff and specifically objects to that portion of the final order which requires the City of Choctaw to operate the facilities in accordance with current regulations from November 3, 1981, and that the City of Choctaw, upon the issuance of permits, participate in the accomplishment of needed construction work.

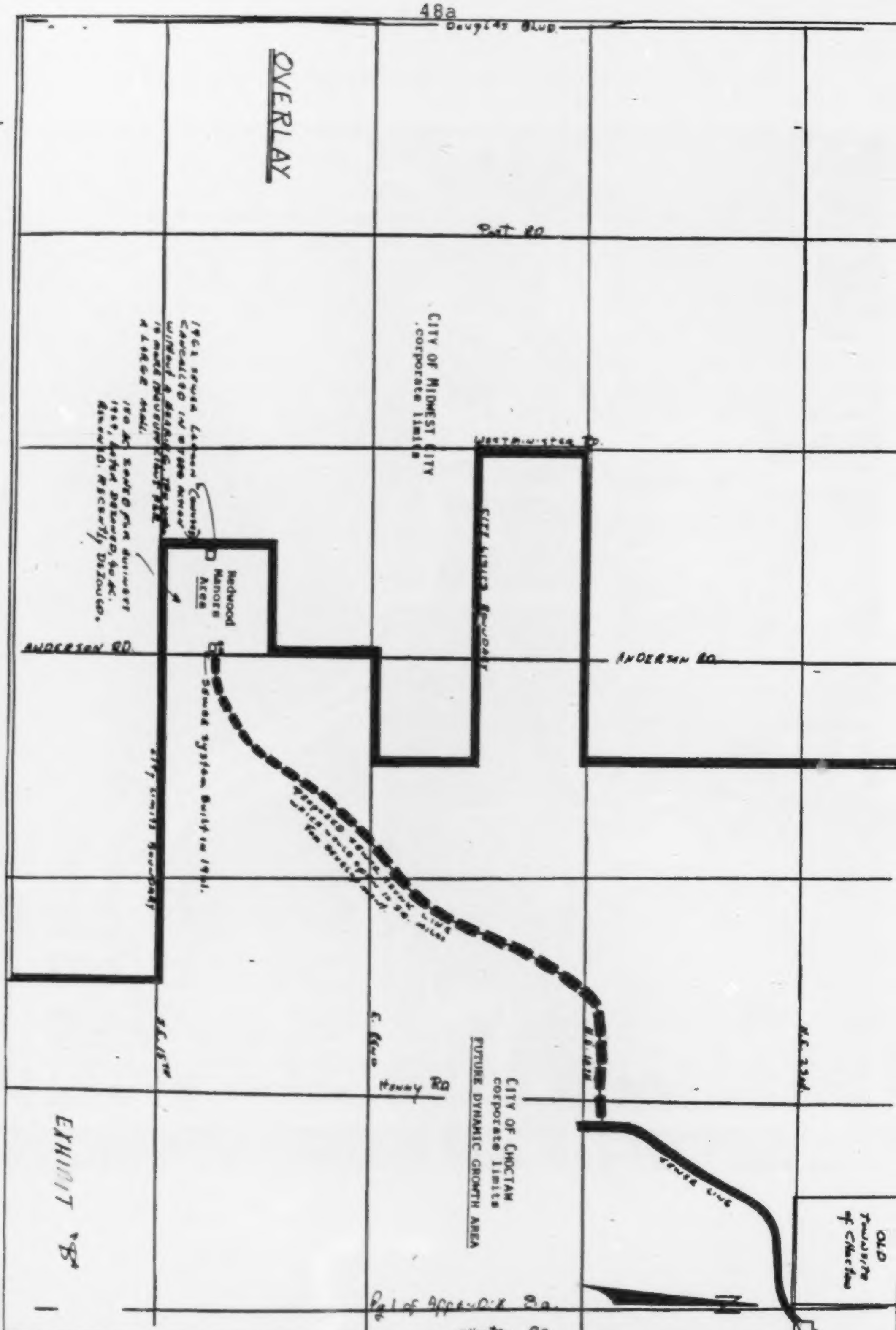
* * *

(From the Record)

1962 LAGOON CANCELLED
WITHOUT A HEARING

47a

1961 LAGOON


Douglas Blvd.
OVERLAY
Post Rd.
CITY OF MIDWEST CITY
corporate limits
Redwood
Manors
Area
ANDERSON RD.
ANDERSON RD.
Sewer system Built in 1961.
City limits boundary
Henny RD
CITY OF CHOCTAW
corporate limits
FUTURE DYNAMIC GROWTH AREA
Sewer Line
OLD
Townsite
of Choctaw
Choctaw RD
EXHIBIT "B"
Pg 1 of Appendix 8a.

MICHAEL COX:

"* * * If the "legislative veto" is unconstitutional, the Governor's signing of the act may not breathe life into it. Thus, the real question is, 'How does the legislative veto' impinge on the power of the executive branch?" The answer is quite clear. By removing the Governor from participation in the legislative process, the legislature is able to amend or pass bills of recission relating to existing statutes without obtaining the Governor's concurrence or, in the alternative, subjecting the action to the veto. This enables the legislature to alter its position as to enacted statutes without executive participation and violates the veto power contained in article VI, Section 2 of the Oklahoma Constitution.

A second constitutional infirmity with respect to the "legislative veto" is that the legislature's conduct interferes with the Governor's responsibility to "cause

the laws of the State to be faithfully executed" (Okla. Const. Art. VI, Section 8) The ability of the Governor to implement enacted legislation by appropriate directives issued by administrative agencies is hampered if the legislature maintains a power to "veto" the executive branch's action. The legislature may, of course, impose its will "by law" under article V of the Constitution, but not without involvement of the executive branch."

The editor, Oliver Delaney of the Oklahoma Gazette in a letter, (in the record), states, "there is no record that the Legislature disapproved the regulations of the 1980 Standards.

(Petitioner asserts that the 1980 Standards are invalid and unconstitutional).

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that W. P. Pointon, Jr., the Appellant and Petitioner, above named, hereby appeals to the United States Supreme Court from the final Judgment of denial of Certiorari of the Supreme Court of the State of Oklahoma.

This appeal is taken pursuant to 28 U. S.C. §1651, and §1257 (2) and (3). The decision appealed from is an Order dated December 16, 1986, denying certiorari by the Supreme Court of the State of Oklahoma and the Order of September 30, 1986, by the Court of Appeals of the Supreme Court of the State of Oklahoma affirming a Judicial Review of an Oklahoma Administrative Procedures Act Order by the Oklahoma County District Court, dated, June 7, 1984, modifying the Administrative Order of November 3, 1981.

(W. P. Pointon, Jr.)
Attorney pro se

CERTIFICATE

I hereby certify that a true and correct copy of the above and foregoing notice of appeal was mailed this 5 day of January, 1987, to Margaret McMorrow-Love, 24th floor First National Center, Okl. City, Okl., 73 102; Ted Pool, 511 Couch Drive, Suite 300, Okl. City Okl., 73102; William Gorden, Oklahoma State Department of Health, P.O. Box 53551 Okl. City, Okl., attorneys for Appellees, by depositing in the U.S. Mails, postage prepaid.

I further certify that a copy of the above and foregoing Petition for notice of appeal was filed in the Office of the Court Clerk of Oklahoma County and the Oklahoma State Supreme Court Clerk (for the justices of the Oklahoma Supreme Court) on the 5 day of January, 1987.

(W. P. Pointon, Jr.)

(Filed Stamped, Supreme Court, State of Oklahoma, January 5, 1987, James W. Patterson, Clerk.)

No. 86-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM P. POINTON, PETITIONER,

v.

JAMES PATTERSON, Clerk of the Supreme Court of the State of Oklahoma, HONORABLE ROBERT D. SIMMS, C.J., HONORABLE JOHN B. DOOLIN, V.C.J., HONORABLE RALPH B. HODGES, J., HONORABLE ROBERT E. LAVENDER, J., HONORABLE RUDOLPH HARGRAVE, J., HONORABLE ALMA WILSON, J., HONORABLE YVONNE KAUGER, J., HONORABLE HARDY SUMMERS, J., HONORABLE MARIAN P. OPALA, J., Justices of the Supreme Court of the State of Oklahoma, and,

CITY OF CHOCTAW, OKLAHOMA AND STATE OF OKLAHOMA ex rel, OKLAHOMA STATE DEPARTMENT OF HEALTH, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF THE CITY OF CHOCTAW, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 1987

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QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court abused its discretion in denying certiorari to an Order of the Court of Appeals of the State of Oklahoma, Division No. I which affirmed the ruling of the District Court of Oklahoma County holding that Petitioner, William P. Pointon, is owner of a sewage lagoon system and is responsible for the operation and maintenance of that system.

2. Whether application of the 1980 standards established by the Oklahoma State Department of Health to the sewage lagoon system is repugnant under the ex post facto and contract clauses of the United States Constitution, or the Thirteenth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, William P. Pointon and the Respondents, City of Choctaw, Oklahoma and the State of Oklahoma ex rel Oklahoma State Department of Health: Water Facilities Engineering Service.

It is unclear why Petitioner has added the Clerk of the Supreme Court of Oklahoma and the respective Justices of the Supreme Court of Oklahoma as respondents in this proceeding. As reaffirmed in *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331, *reh'g denied* 436 U.S. 951, 98 S.Ct. 2862, 56 L.Ed.2d 795 (1978), "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 435 U.S. 355, 356, 55 L.Ed.2d at 338, citing *Bradley v. Fisher,* 13 Wall. 335, 351, 20 L.Ed. 646 (1872). Any action by the Clerk of the Supreme Court of Oklahoma was an integral part of the judicial process; thus, Respondent Patterson is clothed with absolute quasi-judicial immunity. *See Sharma v. Stevas,* 790 F.2d 1486 (9 Cir. 1986); *Morrison v. Jones,* 607 F.2d 1269, 1273 (9 Cir. 1979).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM P. POINTON, PETITIONER,

v.

JAMES PATTERSON, Clerk of the Supreme Court of the State of Oklahoma, HONORABLE ROBERT D. SIMMS, C.J., HONORABLE JOHN B. DOOLIN, V.C.J., HONORABLE RALPH B. HODGES, J., HONORABLE ROBERT E. LAVENDER, J., HONORABLE RUDOLPH HARGRAVE, J., HONORABLE ALMA WILSON, J., HONORABLE YVONNE KAUGER, J., HONORABLE HARDY SUMMERS, J., HONORABLE MARIAN P. OPALA, J., Justices of the Supreme Court of the State of Oklahoma, and,

CITY OF CHOCTAW, OKLAHOMA AND STATE OF OKLAHOMA EX REL, OKLAHOMA STATE DEPARTMENT OF HEALTH, RESPONDENTS.

BRIEF OF THE CITY OF CHOCTAW, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the District Court of Oklahoma County is an unpublished opinion, a copy of which is attached hereto as Appendix A. The decision of the Oklahoma Court of Appeals, Division No. I was not released for publication. A copy of the opinion is attached hereto as Appendix B. A copy of the Order of

the Supreme Court of the State of Oklahoma denying the Petition for Writ of Certiorari is attached hereto as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the State of Oklahoma, Division No. I, was entered on September 30, 1986, affirming the order of the District Court of Oklahoma County. On October 14, 1986, the Court of Appeals of the State of Oklahoma denied a petition for rehearing filed on October 6, 1986. Thereafter, on December 16, 1986, the Supreme Court of Oklahoma denied a petition for certiorari. The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. §1257(2) and (3), and 28 U.S.C. §1651(a).

STATUTES INVOLVED

This matter involves a variety of State statutes including:

Okla. Stat. tit. 63 (1981) §1-904.
Okla. Stat. tit. 63 (1981) §1-910.
Okla. Stat. tit. 75 (1978) §301.
Okla. Stat. tit. 75 (1981) §312.
Okla. Stat. tit. 75 (1981) §318.
Okla. Stat. tit. 75 (1981) §322.
Okla. Stat. tit. 75 (1981) §323.
Okla. Stat. tit. 75 (1981) §324.

Due to the length of the statutes, the statutes are set forth in Appendix D.

STATEMENT OF THE CASE

This matter involves the question of the ownership of and the responsibility for the operation and maintenance of a sewage lagoon system located at the Pointon Redwood Manor Addition, Choctaw, Oklahoma. Respondent takes issue with Petitioner's

"Statement of the Case" and offers the following chronology.

Prior to 1961, the City of Choctaw (the "City") approved a certain plat submitted by Petitioner for the construction of the Pointon Redwood Manor Addition in the SE/4 of Section 5, Township 11N, Range 1W of the Indian Meridian, Oklahoma County, Oklahoma. The plat was filed of record with the County Clerk of Oklahoma County, Oklahoma, on May 13, 1961. As originally filed, the plat contemplated a subdivision of the land into five hundred lots. As of the date of the controversy, only thirty-seven lots had been developed for single-family houses.

Petitioner employed L. M. Bush, a licensed engineer, to perform certain services relating to the construction of the Pointon Redwood Manor Addition. At various times, the City had employed Bush on matters wholly unrelated to the Pointon Redwood Manor Addition.

The engineer's plan and report to the Oklahoma State Department of Health (the "Department") were prepared by Bush and paid for by Petitioner. The report was accompanied by an application for a permit, and stated that it was Petitioner's intention to dedicate the lagoon and lines to the City *after* construction was completed. The plan and report submitted by Bush on behalf of Petitioner contemplated a temporary lagoon and a permanent lagoon system in the southwest corner of the development. The contemplated permanent lagoon system was never built. In addition, Petitioner never conveyed the system to the City.

The City applied for the permit pursuant to the then understood policy of the Department requiring the City to apply for the permit although construction was to be accomplished by Petitioner. The application was made as an accommodation to Petitioner

who desired to develop his property. Petitioner specifically understood that the sole reason the permit was in the name of the City was because of the Department's requirement that a county or city make the formal application. The permit granted was for a temporary discharge lagoon system in the northeast corner of the development and not for the permanent system which was to be located in the southwest section.

L. M. Bush and Company staked the land for the benefit of Petitioner. However, at the request of Petitioner, the land was not staked in accordance with the plans as submitted to the Department. In addition, "as-built" plans of the actual installation of the temporary lagoon system were not submitted to the Department by Petitioner nor was the Department notified of the completion of the project.

The original one-tank system constructed in 1961 in compliance with the then existing rules and regulations of the Department was subjected to substantial unapproved changes made by Petitioner. All changes and modifications to the original temporary system were made by Petitioner without the knowledge or approval of the City. Furthermore, Petitioner did not apply for, nor did he receive, a permit from the Department for these changes and modifications. The additional construction changed the temporary discharge system into a total retention system.

From 1961 through 1979, Petitioner operated and maintained the facility as a private sewage system. Petitioner collected and retained all sewage fees assessed by him to the residents of the Redwood Manor Addition. He did not notify the City of these charges and never remitted any of the fees to the City.

Petitioner asserts that the City is the owner of and is responsible for the sewage system. However, the City did not take any action to and did not accept

any alleged deed, conveyance or easement signed by Petitioner or any affiliated person or entity with reference to the lagoon system. No acceptance of any deed, conveyance or easement appears of record in the official real estate records of Oklahoma County, Oklahoma. From 1961 to 1979, Petitioner never attempted to deed any property involving the sewage system to the City. Rather, he operated the system as a private enterprise.

On June 30, 1986, the Department filed a petition seeking to correct certain problems which it perceived existed at the Redwood Manor Addition. The petition and hearings sought a determination of: 1) whether the system was in compliance with then applicable rules and regulations; 2) who would bear the responsibility for the operation and maintenance of the facility; and 3) whether the facility posed an imminent threat to public health and safety. During the course of the proceedings, it was determined that the facility did not pose an imminent threat to public health and safety. Petitioner appeared at the hearings represented by counsel, and he participated fully in the hearings, presenting witnesses and exhibits for consideration by the Department.

On July 23, 1981, the Department submitted its findings of facts and conclusions of law and its recommended order to the hearing examiner. The Final Order of the Department was entered on November 3, 1981. The City was notified of the order by mail on November 4, 1981 and it filed its Petition for Judicial Review on December 2, 1981 in the District Court of Oklahoma County. On that same date, the City obtained a stay of the enforcement of the Order of the Department only insofar as it applied to the City.

Petitioner filed an "Appeal of Final Order" with the Department on November 13, 1981, which "appeal" was denied on November 23, 1981. Petitioner

then filed pleadings in the District Court of Oklahoma County entitled "Answer to Plaintiff's Petition for Judicial Review and Counterclaims" and also filed a Petition for Judicial Review and an Application for Stay of Enforcement. The application for stay was denied on January 8, 1982. The City filed motions to dismiss and motions to strike the counterclaims and appeal which were sustained by the District Court on February 12, 1982. Petitioner appealed the Order dismissing his counterclaims to the Oklahoma Supreme Court which appeal was dismissed on July 12, 1982.

The case was submitted to the District Court on the briefs of the parties. Pursuant to the provisions of the Administrative Procedures Act, 75 O.S. (1981) §301 *et seq.*, the parties were not entitled to a trial *de novo.* Rather, the District Court reviewed the record as a whole and issued its rulings in an Order dated June 7, 1984 (Appendix A). The Court found as follows:

1. That Petitioner, as owner, should submit "as-built" plans of the entire lagoon system;

2. That plans and specifications to bring the lagoon system up to the standards of the Department in effect in November of 1981 should be submitted by Petitioner within six months;

3. That Petitioner should accomplish any needed construction work and submit a proposed program of minimal construction work to upkeep and repair the system in compliance with the regulations of the Department;

4. That the City and Petitioner should execute any agreement necessary to effectuate the intent of the order of the Court; and

5. That the permit issued by the Department on January 15, 1962, to the City was vacated and held for naught.

Petitioner appealed to the Supreme Court of Oklahoma from the ruling of the District Court. The appeal was assigned to the Court of Appeals, Division No. I. The Court of Appeals affirmed the ruling of the District Court on September 30, 1986 (Appendix B). On December 16, 1986 the Supreme Court of Oklahoma denied the Petition for Certiorari submitted by Petitioner (Appendix C).

REASONS FOR DENYING WRIT

Petitioner's argument in support of his Petition has three major areas. First, he raises the question of jurisdiction premised on his theory that the Department of Health was not authorized to apply the Administrative Procedures Act, 75 O.S. (1981) §301 *et seq.* to a municipal entity or to issue the order against him. Petitioner also attacks the review process pursued by the City. In addition, he challenges the validity of the Opinion of the Court of Appeals dated September 30, 1986, on the basis that both the Department and the District Court of Oklahoma County exceeded their authority in the opinions issued by both entities. Petitioner's arguments do not present federal questions. Furthermore, Petitioner has not demonstrated that the decision of the Court of Appeals is in conflict with decisions of other courts nor has he shown that the state court addressed important questions of federal law in a manner inconsistent with opinions of this Court. Respondent City requests that the Petition be denied.

ARGUMENT

Petitioner argues that the decision of the Department is flawed because the City was not subject to the Oklahoma Administrative Procedures Act, 75

O.S. (1981) §301 *et seq.* (the "Act"). Petitioner relies upon 75 O.S. (1981) §324 in support of this contention. Other than a bare reference to the statute, he cites no case authority wherein the Supreme Court or Court of Appeals of Oklahoma have held that a state agency is not bound to apply the Act in matters within its jurisdiction which collaterally involve a municipality.

This case involves the respective obligations of the parties with regard to the operation of a sewage lagoon system at the Redwood Manor Addition. The Department is the agency vested with jurisdiction over sewage retention systems in the State of Oklahoma. 63 O.S. (1981) §§1-904, 1-910. The City, while not required to follow the Act in its internal operations, is subject to the rules and regulations of the Department. The Department is required to follow the provisions of the Act, 75 O.S. (1978) §301. Because the Department was involved in a matter falling within the scope of its duties, it properly invoked the Act in conducting hearings in which the Petitioner appeared with counsel and presented witnesses and exhibits in his behalf. The Opinion of the Court of Appeals of the State of Oklahoma, Division No. I, held that the case was governed by the provisions of the Act (Opinion, pages 5-6 Appendix B). Petitioner presents no contradictory authority to support his position that the Department and the District Court of Oklahoma County lacked jurisdiction over either the subject matter or the parties in this matter.[1]

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[1] Notwithstanding Petitioner's references to the authorities cited at pages 18-19 of his petition, the Act, while not applying to a municipality in its own internal proceedings, does apply when a municipality is involved in a proceeding before a state agency which is subject to the Act.

Petitioner further states that the City improperly named him as an appellee in its Petition for Review filed with the District Court of Oklahoma County. The Court of Appeals noted that the Petitioner had not sought to quash the summons in the District Court of Oklahoma County. Rather, he appeared through counsel and sought affirmative relief against the City by way of pleadings designated as counterclaims. Having sought affirmative relief against the opposing party, the Court of Appeals ruled that the Petitioner was estopped to question the Court's jurisdiction (Opinion of Court of Appeals, page 6 Appendix B). *First National Bank v. Oklahoma Savings & Loan Board,* 569 P.2d 993 (Okl. 1977); *Rogers v. Rodgers,* 165 P.2d 986 (Okl. 1946). Petitioner presents no case authority contrary to the position of the Court of Appeals.

Petitioner raises a question as to the validity of what he identifies as the "1980 Standards" of the Department. The City notes that in the Second Petition in Error filed with the Supreme Court of Oklahoma, Petitioner did not challenge the validity of the standards but rather questioned whether those standards should have been applied retroactively to the sewage lagoon system at the Pointon Redwood Manor. Petitioner did raise the issue of the validity of the standards in his Reply Brief filed on May 10, 1985, citing an article from the Oklahoma Law Review in 1978. Petitioner did not provide the Oklahoma Court of Appeals or the Oklahoma Supreme Court with any case or statutory authority to show that the 1980 standards were unconstitutional or that he had preserved that issue before the Department or the District Court of Oklahoma County.

Petitioner's additional arguments appear to relate to his dissatisfaction with the decision of the District Court of Oklahoma County concerning the sewage permit which was never used. The question

of the permit is irrelevant to the District Court's holding that the Petitioner has the burden of bringing this lagoon, which was built pursuant to a different permit, up to the 1980 standards.

Petitioner sets forth a variety of allegations concerning alleged violations of due process and equal protection, as well as including allegations of ex post facto laws, bills of attainder, impairment of obligation of contracts and penal servitude. All are without merit.

As used in the United States Constitution and in the Oklahoma Constitution, a bill of attainder is a legislative act which inflicts punishment on named individuals or members of an easily identifiable group without judicial trial. *United States v. Brown,* 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965); *Board of Regents of Oklahoma Agricultural Colleges v. Updegraff,* 237 P.2d 131 (Okl. 1951). There was no legislative act involved in this case. Because there was no legislative act, neither a bill of attainder nor an ex post facto law exists. Likewise, Petitioner's argument of impairment of obligation of contract is without merit because there was no contract in existence to be impaired, and no law was passed to impair the obligation of any contract which might have existed.

With reference to the general classification of due process and equal protection violations, the City asserts that whatever protection Petitioner was entitled to, he was afforded. It is fundamental that in order for an action of a municipality to be obnoxious to the Fourteenth Amendment, there must be a classification by the municipality and the classification must be arbitrary and unreasonable. *Bachtel v. Wilson,* 204 U.S. 36, 51 L.Ed. 357 (1907). Without a classification, much less an arbitrary or unreasonable one, equal protection challenges fail. As the court in *Califano v. Boles,* 443 U.S. 282, 99 S.Ct. 2767,

61 L.Ed.2d 541 (1979), noted, the scrutiny of an equal protection claim must begin with the statutory classification. Only when it is shown that a legislative act has a substantial disparate impact on a particular class defined in a different fashion may the analysis continue on the basis of the impact on the class. As noted above, there was no legislative action. Therefore, no equal protection violation could have occurred.

Petitioner also argues that he has been deprived of his right to due process of law. The first inquiry is whether the plaintiff is deprived of a life, liberty or property interest protected under the Constitution. *Baker v. McCollan,* 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). Petitioner's position on this point is in conflict with his other arguments. He has argued consistently throughout the appellate proceedings that he had no property interests since he had divested himself of any interest by conveyance to the City. If he had no property interest, there could be no due process violation. However, he did have a property interest. He was the individual who owned, operated and maintained the system.

Petitioner was afforded due process. Four days of hearings were held before the Department at which Petitioner appeared, was represented by counsel, was allowed to examine and cross-examine witnesses and produce exhibits. Due process does not require that all procedural safeguards be provided. In administrative proceedings, the due process safeguards required are substantially less than those in a formal judicial proceeding. All that is required in an administrative proceeding is that the party claiming a deprivation of property be given notice and an opportunity for hearing that is appropriate to the particular case. *Parratt v. Taylor,* 451 U.S. 527, 540, 101 S.Ct. 1908, 68 L.Ed.2d 420, 432 (1981) citing *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct.

1187, 14 L.Ed.2d 62 (1965). This was done. All due process to which Petitioner was entitled was afforded to him.

The City of Choctaw has been engaged in this dispute since the original petition was filed by the Department in June of 1980. Petitioner has brought three separate proceedings to the Supreme Court of Oklahoma arising out of the petition filed by the Department. As a last resort, he has filed this Petition for Certiorari based on the denial of a petition for certiorari by the Supreme Court of Oklahoma. This Petition for Certiorari is without merit and the City of Choctaw respectfully requests that the Court decline to grant said Petition.

Respectfully submitted,

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Attorneys for Respondent,
City of Choctaw, Oklahoma

April, 1987

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that three copies of the Response Brief in Opposition to the Petition for Certiorari were mailed, with postage prepaid thereon to: William P. Pointon, Jr., P.O. Box 4130, Nicoma Park, Oklahoma 73066 and to the General Counsel, Oklahoma State Department of Health, P.O. Box 53551, Oklahoma City, Oklahoma 73152.

JOHN JOSEPH SNIDER

IN THE
DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA
June 7, 1984

CITY OF CHOCTAW,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. CJ-81-5741
	)	
STATE OF OKLAHOMA, EX REL OKLAHOMA STATE DEPARTMENT OF HEALTH; WATER FACILITIES ENGINEERING SERVICE AND WILLIAM POINTON, JR.,	)	
	)	
Defendants-Appellees.	)	

ORDER

This cause comes on to be heard on the brief of the City of Choctaw, Plaintiff-Appellant; the brief of the State of Oklahoma, Defendant-Appellee; the brief of William P. Pointon, Jr., Defendant-Appellee and the reply brief of the City of Choctaw, Plaintiff-Appellant.

On consideration whereof it is ordered by the Court that William P. Pointon, Jr., Defendant-Appellee, the owner of the sewage lagoon system in Pointon's Redwood Manor Addition to the town of Choctaw City being a part of the Southeast Quarter (SE 1/4), Section Five (5) Township Eleven (11) North, Range One (1) West of the Indian Meridian, Oklahoma County, Oklahoma, shall cause to be prepared, by a licensed engineer, for submission by the City of Choctaw to the Water Facilities Engineering Service

of the Oklahoma State Department of Health, the following:

1. As-built plans of the entire sewage lagoon system located in the above described addition which is to include the location of the individual sewage lines in Block One (1), within seventy (70) days from the date of this order; and,

2. Plans and specifications which will bring the sewage lagoon system and main sewer lines into compliance with design standards and rules which were in effect on November 3, 1981, within a reasonable amount of time, said time not to exceed six (6) months from the date of this order.

It is further ordered by the Court that upon issuance of the permits by the Water Facilities Engineering Service of the Oklahoma State Department of Health to William P. Pointon, Jr., Defendant-Appellee, he shall accomplish any needed construction work, and in addition thereto a proposed program of minimal construction work, intensive upkeep and repair subject to approval by the Water Facilities Engineering Service of the Oklahoma State Department of Health.

It is further ordered by the Court that Plaintiff-Appellant and Defendant-Appellee shall execute any agreements necessary, within the bounds of standard engineering practice, to effectuate this order.

It is further ordered by the Court that the permit issued by the Water Facilities Engineering Service of the Oklahoma Department of Health on January 15, 1962, to the town of Choctaw is vacated and held for naught.

Dated this 7th day of June, 1984.

JAMES B. BLEVINS
District Judge

IN THE
COURT OF APPEALS OF THE
STATE OF OKLAHOMA
Division No. 1
September 30, 1986

CITY OF CHOCTAW,	)	
	)	
Plaintiff-Appellee,	)	
	)	
versus	)	Case Number
	)	62,668
STATE OF OKLAHOMA, EX REL. OKLAHOMA STATE DEPARTMENT OF HEALTH: WATER FACILITY ENGINEERING SERVICE,	)	
	)	
Defendant-Appellee	)	
	)	
and	)	
	)	
WILLIAM P. POINTON, JR.,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA
HONORABLE JAMES B. BLEVIN, DISTRICT JUDGE
AFFIRMED

W.P. Pointon, Jr., Midwest City, Oklahoma,	Pro se,
Ted N. Pool, Del City, Oklahoma, Margaret McMorrow-Love, Oklahoma City, Oklahoma,	For Appellee Choctaw,
William W. Gorden, Oklahoma City, Oklahoma,	For Appellee, OSDH,

Opinion by Patricia D. Robinson, Judge:

This case involves the question of the ownership, operation and maintenance of a sewage lagoon system constructed and maintained by Appellant from 1961 to 1979. The controversy was initiated with a petition by the Oklahoma State Department (Department) of Health naming as respondents, William P. Pointon, Jr., (Appellant) and Appellee, City of Choctaw (City). On November 3, 1981, the Department entered its final order. The Department's order stated that since the facility was already built, Appellant was to provide the "as built" plans for the facility. He was also required to provide engineering plans and specifications to bring the facility up to date as to the date of issuance of the permit, 1961. Appellee, City of Choctaw, however, was required to operate the site from the date of the order and both Appellee City and Appellant were required to do the construction work to accomplish the plans and specifications. Thereafter the City filed a Petition for Judicial Review of the Department's order to the District Court. Appellant filed two pleadings in the District Court entitled "Answers and Counterclaims". The City responded by filing a Demurrer or Motion to Strike these pleadings which was sustained. Appellant's appeal from that decision was dismissed by the Supreme Court. Appellant also filed an Application for Original Jurisdiction which was denied by the Supreme Court. The appeal of the City to the District Court was sustained on June 7, 1984. The order of the District Court differs only in four respects from the original Department of Health Administrative order:

1. The plans and specifications for construction of the facility must be brought up to meet the standards of 1981 instead of 1961;

2. the construction is solely to be the responsibility of Appellant;

3. no responsibility for operation is mentioned; and

4. the permit issued by the Department on January 15, 1962, to the City is vacated and held for not.

Appellant now appeals the District Court's order.

Prior to 1961 City approved a certain plat submitted by Appellant for the construction of the Pointon Redwood Manor Addition. Appellant employed the services of an engineer to issue a plan and report to the Department and said report was prepared by the engineer and paid for by Appellant. City applied for and received a permit for a temporary sewage lagoon system and sewage collection lines to serve the property to become known as the Redwood Manor Addition. The report of the engineer was accompanied by the application for the permit and stated that it was the intention of Appellant to dedicate the lagoon and lines to the City after construction was completed. The City applied for the permit pursuant to the then understood Department's policy requiring the City to apply for the permit although construction was to be completed by Appellant. The permit granted was for a temporary discharge lagoon system in the northeast corner of the development. The engineer staked the land for the benefit of Appellant but the land was, at the request of Appellant, not staked in accordance with the plans as drafted and submitted to the Department on behalf of Appellant. In addition, "as built" plans of the actual installation of the temporary lagoon system were not submitted to the Department by Appellant nor was the Department notified of the completion of the project. Substantial unapproved changes were made to the system by Appellant. Between September of 1961 and September of 1974, Appellant constructed three additional lagoon cells and a transfer pump. He did not apply for

nor did he receive a permit from the Department for these changes and modifications. In addition, he did not inform, consult or obtain the consent of the City to the changes that he was making in the lagoon system. The additional construction changed the temporary discharge system into a total retention system. The Department became aware of the lagoons and the transfer pump addition by Appellant in 1974 but did not complain about the changes until 1980.

From the year 1961 through 1979 Appellant operated and maintained the facility as a private sewage system and collected and retained all sewage fees assessed by him from the residents of the Redwood Manor Addition. During the hearings at the Department, Appellant asserted that in 1979 he had a deed by which he, or one of his corporations, attempted to convey to the City some of the property upon which the lagoon and some of the sewage collection lines were located. He testified that in 1961 he was the owner of the sewage system and conveyed the same to Pointon Realty, who in turn conveyed it to Private Roads, Inc., of which Pointon is the president and sole stockholder. He stated that he had no knowledge or information regarding whether the City accepted any "conveyance" and testified that he never informed the City that he was filing an easement. The City asserts that they never accepted the sewage system and it did not maintain, operate or collect fees on the system from its inception. From 1961 to 1979, Appellant never attempted to deed any property concerning the sewage system to the City but rather operated the system as a private enterprise.

The issues before this Court are whether the record sustains the findings by the District Court that Appellant is responsible for preparing as "built plans" for the sewage system; preparing plans and specifications for bringing the system up to the 1981 standards and further, whether the record sustains

the finding that Appellant shall bear all financial responsibility for the performance of needed construction work to bring the facility into compliance with the 1981 standards and to create and prepare a proposed program of minimal construction, upkeep and repair of the system subject to the approval of the Oklahoma State Department of Health.

Appellant presents numerous questions for review. Certain of Appellant's propositions are overlapping and we will address them accordingly.

First, Appellant argues that the District Court failed to consider certain evidence that he presented including the permit issued by the Department, an affidavit by a former council member of the City of Choctaw, and a 1961 prospectus of the City. He then reaches the conclusion that the District Court's ruling is therefore against the weight of the evidence. Apparently Appellant thinks that since the ruling was unfavorable to him that it necessarily follows that the Court either failed to consider the evidence he presented or disregarded it entirely. This case is governed by the provisions of the Administrative Procedure Act of Oklahoma, 75 O.S. 1981 §301 *et seq.* This Act governs the procedure for initiating a judicial review of an administrative order as well as the scope of that review. 75 O.S. 1981 §§318 and 323. The reviewing District Court must review the entire record to determine if there is "substantial evidence" to sustain the finding of the agency. *Brown v. Banking Board,* 512 P.2d 166 (Okl. 1973). If the facts determined by an agency are supported by the substantial weight of the evidence, the decision of the agency should be affirmed. *Tulsa Area Hospital Council v. Oral Roberts Univ.,* 626 P.2d 316 (Okla. 1981).

After reviewing the record we agree with the District Court that the Department's original order was against the substantial weight of the evidence.

Next, Appellant asserts that both the agency and the District Court lacked jurisdiction over the subject matter of the action and lacked in personam jurisdiction over Appellant since he was not "a real party in interest". Appellant did not seek to quash the issuance of the summons but rather appeared both in the Department level and in the District Court where he sought affirmative relief. Since he sought affirmative relief against the opposing party, he submits himself to the jurisdiction of the court for all purposes in the action and is estopped from questioning the court's jurisdiction in the first instance. *Rodgers v. Rodgers,* 165 P.2d 986 (Okl. 1946). Appellant was also a real party in interest both at the Department level and in the District Court. A real party in interest under the Administrative Procedure Act is a person named and participating in an individual proceedings. *First National Bank v. Oklahoma Savings & Loan Board,* 569 P.2d 993 (Okl. 1977). Appellant was clearly named by the Department and he participated fully in the proceedings by way of testimony and evidence. In addition, he appeared in the action in District Court, brought numerous appeals and proceedings in the Supreme Court and sought affirmative relief in the District Court.

Appellant contended in the District Court that the Court lacked subject matter jurisdiction because the Department lacked subject matter jurisdiction. The Department has jurisdiction over sewage lagoon systems pursuant to the provisions of 63 O.S. 1981 §1-908. The Department is vested with jurisdiction over any person found to be in violation of any of the provisions of the code governing sewage disposal systems. A permit issued by the Department is not a prerequisite to the Department's jurisdiction. Attorney General Opinion No. 78-295 (Dec. 23, 1978). Therefore merely because a permit was not issued in Appellant's name individually did not divest either the Department or the Court of subject matter juris-

diction. Appellant constructed, operated, and maintained the system from 1961 through 1979 and the Department has jurisdiction over such system. Therefore, subject matter jurisdiction is present. The District Court also had jurisdiction pursuant to 75 O.S. 1981 §318 which provides that a person aggrieved from a final order of an agency shall be entitled to judicial review.

Appellant argues that his counterclaims and Petition for Review were improperly dismissed. Appellant's counterclaims were brought under a broad number of categories, from tort to contract, from civil rights to fraud, and allegations of criminal activity, all against the City and the Department. These actions were not cognizable under the aegis of an administrative appeal, where none of them had been raised at the administrative level nor were they capable of being so raised under the Administrative Procedures Act 75 O.S. 1981 §301 et seq. The District Court was sitting as an appellate court and not as a court of Original Jurisdiction and therefore new requests for affirmative relief were inappropriate. The ruling of the District Court dismissing the Appellant's counterclaims was correct.

Appellant also complains that his Petition for Judicial Review filed in the District Court was incorrectly dismissed as being untimely. Appellant filed a Motion for New Trial or Motion to Reconsider with the Department which was denied on November 23, 1981. The City filed its appeal on December 2, 1981 in the District Court. Service was had on Appellant on December 9, 1981. Appellant did not file any pleadings with the District Court until an Answer and Counterclaim on December 31, 1981. At that time he also filed a petition for judicial review and an application for stay which was denied by the Court.

An appeal from an adverse decision of an administrative agency is governed by 75 O.S. 1981 §318

which provides that it must be filed within thirty days after the Appellant is notified of the order. In his Motion for Stay, Appellant stated that he received the order of the Department on November 4, 1981. Thus, in order to have filed a timely appeal the Petition for Review had to be filed on or before December 4, 1981 but was not filed until December 31, 1981. Further, if his "appeal" to the Department stayed the appeal time, then he still had to file by December 23, 1981, not December 31, 1981. When an appeal is not timely filed, appellate courts lack jurisdiction. *Conoco, Inc. v. State Department of Health,* 651 P.2d 125 (Okl. 1982); *Citizens' Action for Safe Energy, Inc., v. Oklahoma Water Resources Bd.,* 598 P.2d 271 (Okl. App. 1979).

Appellant further argues that he did not personally receive timely notice of the Department's overruling of his"Motion for New Trial". Appellant has never asserted that his counsel did not receive notice. In all stages of the Department hearings and in the District Court, Appellant was represented by counsel. It is only on this appeal that he is appearing pro se. Notice to counsel is notice to an Appellant for the purposes of determining whether a notice of appeal is timely filed. *Harlan v. Graybar Electric Co.,* 442 F.2d 425 (9th Cir. 1971).

Appellant's next contention is that both the City and the Department have engaged in malicious prosecution and an abuse of process. The five elements that must be established for a malicious prosecution action are:

1. The bringing of an action;
2. its successful termination in favor of plaintiff;
3. want of probable cause;
4. malice; and

5. damages.

Lewis v. Crystal Gas Co., 532 P.2d 431 (Okl. 1975). The action by the Department in the appeal by the City have not been terminated in favor of Appellant. In addition, Appellant cannot show a want of probable cause on behalf of the Department for bringing a petition after a citizen had complained about the condition of the sewage lagoon system.

To bring an action for abuse of process, the elements are:

1. That the defendant made an illegal, improper or perverted use of process;
2. that he had ulterior motives; and
3. that damages resulted.

The abuse of process must be the illegal service or use of process and not the underlying basis of the cause of action. *Neal v. Pennsylvania Life Insurance Co.*, 480 P.2d 923 (Okl. 1970). Appellant does not assert that a process of the court was used for an unauthorized or improper method.

Next, Appellant argues that the statute of limitations and the doctrine of laches bars this proceeding. Appellant cites no specific Statute of Limitations which was violated.

The doctrine of estoppel, on the other hand, is based upon one party being prejudiced by relying on the acts, silence or omissions of another. *Wattie Wolfe Co. v. Superior Contractors, Inc.*, 417 P.2d 302 (Okl. 1966). Equitable estoppel against the State is only appropriate in exceptional circumstances where public policy and interest so dictate. *Harris v. State ex rel. Oklahoma Planning and Resources Bd.*, 251 P.2d 799 (Okl. 1952). Under the facts of this case, Appellant's plea of estoppel cannot be sustained.

Appellant's next proposition of error is that he conveyed the sewage lagoon system and all additions and modifications thereto to the City and that therefore the City was solely and exclusively responsible for its maintenance. Appellant bases this conclusion upon the temporary "permit" as well as the laws of Oklahoma governing easements and dedications to municipalities. The City asserts that the temporary lagoon system and the three cells which were added thereto were never conveyed, dedicated or accepted by the City of Choctaw. Appellant relies upon the fact that a permit had been issued in the name of the City. Appellant testified that in 1961 he was the owner of the system and conveyed the same to one of his corporations. Appellant contracted for the construction of both the original lagoon system and all modifications thereto. He arranged and contracted for the construction of all the sewage lines and arranged for having the lines staked. He collected and retained all fees from home owners with reference to the sewage system. He added to the original temporary lagoon system to make it a full retention system which were not in accordance with the plans submitted to the Department nor did Appellant obtain a permit from the Department for these changes and modifications, nor did he inform the City thereof. The mere fact that a permit was issued in the name of the City does not make the City responsible for the system, in light of the fact that Appellant from 1961 to 1979 operated the system, modified the system and collected and retained all fees with reference to the system.

Appellant also contends that he either by the plat or by his efforts in 1979 to deed the sewage system to the City, the City became the owner and thus is liable for its operation and upkeep. The plat states the owner "dedicates to the public use the streets and easements for road purposes and public utili-

ties. . ." Language of this nature does not convey fee title of any property to a municipality as only words of grant or conveyance are used to pass title. *Town of Reydon v. Anderson,* 649 P.2d 541 (Okl. 1982); *Board of Trustees of the Town of Taloga v. Hadson,* 574 P.2d 1038 (Okl. 1978). For a dedication or easement to be effective, there must be an intent on the owner to dedicate the land for public purposes and, a specific acceptance of that dedication by the City. *City of Ardmore v. Knight,* 270 P.2d 325 (Okl. 1954). The rationale being that a municipality should not have undesirable properties thrust upon it with all the burdens attendant to that property without some specific action on its part showing acceptance. *Oklahoma City v. Williamson,* 90 P.2d 1064 (Okl. 1939). The record reflects that the City of Choctaw took no affirmative action to accept any deed attempted to be conveyed by Appellant in 1979, thus there was no valid passage of title.

Because Appellant alone directed and controlled this sewage system from 1961 to 1979 reaping all pecuniary benefits therefrom, we find that the system in question is owned as a private system by Appellant. Such private ownership is allowed in Oklahoma. *Jacobson's Lifetime Buildings, Inc., v. City of Tulsa,* 333 P.2d 307, 310 (Okl. 1958). The City's initial participation stemmed only from an informal Department policy that the potentially affected municipality be named on the permit. Because the system has been and presently remains a private system, the District Court was correct in finding that Appellant was to bear the financial responsibility for bringing the system into compliance with Department rules and regulations.

Appellant next argues that he was injured by an act of "fraudulent concealment" based on the fact that a permit was issued to the City. Fraud is never presumed but must be established by clear and con-

vincing evidence of the party alleging fraud. Fraud consists of a material misrepresentation that is false; that the plaintiff knew it was false when it was made; and that it was made with the intent that the other party rely upon it and that the party did rely, in fact, upon it to its detriment. *State of Oklahoma ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okl. 1973); *Brooks v. Lagrand*, 435 P.2d 142 (Okl. 1967). The record reflects that it was Appellant's engineer who submitted the plans and specifications together with the permit to the Department. No misrepresentations were made to Appellant by the City.

Lastly, Appellant asserts a variety of allegations concerning alleged constitutional violations of due process, equal protection, violations of ex post facto laws, bills of attainder, impairment of contracts and penal servitude. A bill of attainder is a legislative act which inflicts punishment on named individuals or members of an easily identifiable group without judicial trial. *Board of Regents v. Updegraff*, 237 P.2d 131 (Okl. 1951). Here there is no legislative act involved and therefore a bill of attainder or an ex post facto law does not exist. Also his argument of impairment of contract is without merit since no contract existed which could be impaired.

During four days of hearings before the Department, Appellant appeared, was represented by counsel, was allowed to examine and cross-examine witnesses and produce exhibits. The same applies in the District Court. Appellant was given notice and an opportunity for hearing and therefore due process was afforded to him.

For all the above stated reasons we find that the order of the District Court is correct and is hereby affirmed.

AFFIRMED.

GRAY, P.J. and REYNOLDS, J. concur.

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA
Tuesday, December 16, 1986

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

62,668 City of Choctaw v. State of Oklahoma ex rel. Oklahoma State Department of Health et al.
Certiorari denied.
CONCUR: Simms, C.J., Doolin, V.C.J., Hodges, Lavender, Hargrave, Wilson, Kauger, Summers, JJ.
DISSENT: Opala, J.

62,735 J. Ronald Petrikin v. Dobbs Fleet Leasing, Inc.
Certiorari denied.
CONCUR: Simms, C.J., Doolin, V.C.J., Hodges, Lavender, Hargrave, Wilson, Kauger, Summers, JJ.
DISSENT: Opala, J.

64,783 Larry Allford etc. v. McAlester Clinic, Inc., C.K. Holland, Leroy Milton.
Both petitions for certiorari denied.
CONCUR: Simms, C.J., Doolin, V.C.J., Hodges, Lavender, Wilson, Kauger, JJ.
DISSENT: Hargrave, Opala, Summers, JJ.

67,359 The Nash Public Works Authority, a public trust and its Trustees, John M. Wilkins, Jessie McCormick and Clydean Dark v. Hon. Jack R. Parr, District Judge for the Seventh Judicial District.
Rehearing denied.
CONCUR: Simms, C.J., Doolin, V.C.J., Hodges, Lavender, Opala, Wilson, Summers, JJ.
DISSENT: Hargrave, Kauger, JJ.

67,427 John E. Rooney and Marjorie K. Rooney, Trustees d/b/a Rooney Oil Company v. J. Kenneth Love, the Honorable Judge of the District Court of the 21st Judicial District, County of McClain, State of Oklahoma.
Application to assume original jurisdiction denied.

67,579 Robert Moore and Dal-Tex Company, Inc. v. Hon. John Maley, District Judge.
Application for temporary stay denied.
Application to assume original jurisdiction denied.

Chief Justice

APPENDIX D

STATUTES INVOLVED

Okla. Stat. tit. 63 (1981) §1-904.

"Standards, rules and regulations

The State Board of Health shall adopt standards and rules and regulations for the supplying of water to the public for drinking and other domestic purposes; for the construction and extension of waterworks and other facilities used or to be used in connection with water supplied or to be supplied to the public; for specification and directions as to the source, manner of storage, purification and distribution of water supplied to the public; for the construction and extension of sewer systems or sewage treatment plants or other facilities used in connection therewith; for industrial discharges into sanitary sewer systems or sewage treatment plants; for the construction and operation of private sewage disposal systems; and standards for individual water supplies; and requiring control tests, laboratory checks, operating records and reports as to public water supply systems and sewage treatment systems including the submission of water samples for testing at least one time each month. Such standards and rules and regulations may provide for the exemption of specified categories of water supply and sewerage facilities from any of the requirements thereof, or of this article, if the public health will not thereby be endangered."

Okla. Stat. tit. 63 (1981) §1-910.

"Sewage disposal systems-Subdivisions in certain counties-Approval stamps-Local regulations

A. No community or private sewage disposal system shall be constructed or operated in the corporate limits of a city or town, or county when designated by the local health officer and filed with the county clerk, unless such system, when constructed, complies with requirements prescribed by the State Board of Health as determined by an inspection performed by the local health officer. Provided, that upon reinspection of an approved system, performed at the request of the lot owner, the local health officer shall not require that the system be uncovered unless there is evidence that the system has not functioned properly.

B. Any person, corporation or other legal entity which contemplates the subdividing of land into one or more tracts of less than two and one-half (2 1/2) acres outside the corporate limits of a city or town shall make application to and receive approval from the State Commissioner of Health prior to recording any plat in the office of the county clerk, of such subdivision, offering lot or lots for sale thereof or beginning construction thereon. Provided, in counties having a population of less than three hundred thousand (300,000) persons according to the preceding Federal Decennial Census, that for the purposes of this act all subdivisions containing any tract of less than two and one-half (2 1/2) acres including out-lots shall be surveyed and a plat thereof made as provided by Section 41-101 of Title 11 of the Oklahoma Statutes. Out-lots shall be defined as a lot situated outside the corporate limits of a town or city. The application shall be in a form required by the State Board of Health and shall include a plan of the subdivision and a description of the methods for providing water supply and sewage disposal. If individual wells and/or

sewage disposal systems are to be used, the plan of the subdivision shall be drawn to show streets, building lines, lot dimensions, lot numbers, contours, percolation tests, core tests, location of wells and sewage disposal systems. Upon the approval of the application and plan by the State Commissioner of Health, the plat shall be imprinted with the stamp of the State Department of Health bearing the word "approved", restrictions, if any, signature of the Commissioner or local health officer and the date. Approval of the plat shall be made effective thirty (30) days after the same is filed with the Department unless specifically rejected prior to the expiration of the said thirty-day period of time. The office of county clerk shall not record a plat unless said instrument bears the "approved" stamp of the State Department of Health. Provided, however, the State Department of Health shall have no authority to disapprove and shall approve plats of tracts that are being developed for individual residence in which no single tract is less than two and one-half (2 1/2) acres."

Okla. Stat. tit. 75 (1978) §301.

"Definitions

As used in this act:

(1) "Agency" means any state board, commission, department, authority, bureau or officer authorized by the Constitution or statutes to make rules or to formulate orders, except:

(a) The Legislature or any branch, committee or officer thereof;

(b) The courts;

(c) The Oklahoma Tax Commission, Oklahoma Public Welfare Commission, Transportation

Commission, the Oklahoma Ordinance Works Authority and Oklahoma Corporation Commission, except with respect to Section 304 of this title;

(d) The Pardon and Parole Board;

(e) The Oklahoma Military Department;

(f) The supervisory or administrative agency of any penal, mental, medical or eleemosynary institution, in respect to the institutional supervision, custody, control, care or treatment of inmates, prisoners or patients therein; provided, that the provisions of this act shall apply to and govern all administrative actions of the Oklahoma Alcohol Prevention, Training, Treatment and Rehabilitation Authority;

(g) The Board of Regents or employees of any university, college, or other institution of higher learning, except with respect to expulsion of any student for disciplinary reasons; provided, that any alleged infraction by a student of rules of such institutions, with a lesser penalty than expulsion or suspension for a period exceeding one (1) week, shall not be subject to the provisions of this act; and further providing that a student in a state-supported institution of higher learning against whom a disciplinary proceeding shall have been commenced upon sworn affidavit on one of the following grounds of misconduct may forthwith be barred from the campus and be removed from any college or university-owned housing, pending final determination of the proceeding against him:

1. participation in a riot as defined by the penal code;

2. possession or sale of any drugs or narcotics prohibited by the penal code;

3. willful destruction of or willful damage to state property;

4. unauthorized presence in or occupation of any part of the campus after resisting an order to leave by duly constituted authority;

(h) The Oklahoma Horse Racing Commission, its employees or agents with respect to hearing and notice requirements on the following classes of violations which are an imminent peril to the public health, safety and welfare:

1. any rule regarding the running of a race;

2. any violation of medication laws and rules;

3. any suspension or revocation of an occupation license by any racing jurisdiction recognized by the Commission;

4. any assault or other destructive acts within Commission-licensed premises;

5. any violation of prohibited devices, laws and rules;

6. any filing of false information.

(2) "Rule" means any agency statement of general applicability and future effect that implements, interprets or prescribes substantive law or policy, or prescribes the procedure or practice requirements of the agency. The term includes the amendment or repeal of a prior rule but does not include (A) the issuance, renewal or denial of licenses; (B) the approval, disapproval or prescription of rates; (C) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; (D) interagency memoranda; or (E) declaratory rulings issued pursuant to Section 308 of this title;

(3) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;

(4) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(5) "Rulemaking" means the process employed by an agency for the formulation of a rule;

(6) "Order" means all or part of the final or intermediate decision, whether affirmative, negative, injunctive or declaratory in form, by an agency in any matter other than rulemaking, or rulings on motions or objections made during the course of a hearing, or exclusions described in clauses (C) and (D) of paragraph (2) of this section;

(7) "Individual proceeding" means the process employed by an agency for the formulation of an order;

(8) "Party" means a person or agency named and participating or properly seeking and entitled by law to participate, in an individual proceeding;

(9) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency."

Okla. Stat. tit. 75 (1981) §312.

"Final orders-Contents-Notification

A final order adverse to a party in an individual proceeding shall be in writing or stated in the record. A final order shall include findings of fact and conclusions of law, separately stated.

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the order shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any order. Upon request, a copy of the order shall be delivered or mailed forthwith to each party and to his attorney of record."

Okla. Stat. tit. 75 (1981) §318.

"Judicial review

(1) Any person or party aggrieved or adversely affected by a final order in an individual proceeding, whether such order is affirmative or negative in form, is entitled to certain, speedy, adequate and complete judicial review thereof under this act, but nothing in this section shall prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions. Neither a motion for new trial nor an application for rehearing shall be prerequisite to secure judicial review.

(2) The judicial review prescribed by this section, as to orders rendered in individual proceedings by agencies whose orders are made subject to review, under constitutional or statutory provisions, by appellate proceedings in the Supreme Court of Oklahoma, shall be afforded by such proceedings taken in accordance with the procedure and under the conditions otherwise provided by law, but subject to the applicable provisions of Sections 319 through 324 of this title, and the rules of the Supreme Court. In all other instances, proceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review

resides or at the option of such party where the property interest affected is situated, within thirty (30) days after the appellant is notified of the order as provided in Section 312 of this title. Copies of the petition shall be served upon the agency and all other parties of record, and proof of such service shall be filed in the court within ten (10) days after the filing of the petition. The court, in its discretion, may permit other interested persons to intervene."

Okla. Stat. tit. 75 (1981) §322.

"Setting aside, modifying or reversing of orders-Remand-Affirmance

(1) In any proceeding for the review of an agency order, the Supreme Court or the District or Superior Court, as the case may be, in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in Section 10 of this Act, including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise

substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or

(f) arbitrary or capricious; or

(g) because findings of fact, upon issues essential to the decision were not made although requested.

(2) The reviewing court, also in the exercise of proper judicial discretion or authority, may remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue.

(3) the reviewing court shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant."

Okla. Stat. tit. 75 (1981) §323.

"Review of final judgment of a district or superior court by appeal to Supreme Court

An aggrieved party, or the agency, without any motion for a new trial, may secure a review of any final judgment of a district or superior court under this Act by appeal to the Supreme Court. Such appeal shall be taken in the manner and time provided by law for appeal to the Supreme Court from the district court in civil actions. An agency taking an appeal shall not be required to give bond."

Okla. Stat. tit. 75 (1981) §324.

"Act not to apply to certain governments, authorities, etc.

This Act shall not apply to municipalities, counties, school districts, and other agencies of local government; nor to specialized agencies,

authorities, and entities created by the legislature, performing essentially local functions, such as, but not limited to, Urban Renewal Authorities, Port Authorities, City and City-County Planning Commissions, Conservancy and other Districts, and public trusts having a municipality or county, or agency thereof, as beneficiary; but this Act shall apply to public trusts having the State, or any department or agency thereof, as beneficiary."